K

Elsie Fox

from the author

J.C.F.

July 1927.

Extract from J.C.F's diary:-
Wed. Nov. 22, 1933. Professor Frankfurter* ... was kind enough to praise my book on Contempt of Court. Mrs Gretton told me that after I left he said "That man has turned the current of the law. His book on Contempt of Court is the finest piece of legal writing that has appeared in this century." I don't mind writing this down, as no-one will see it.

* Late Supreme Court Justice U.S.A.

THE HISTORY OF CONTEMPT OF COURT

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THE HISTORY OF CONTEMPT OF COURT

THE FORM OF TRIAL AND THE MODE OF PUNISHMENT

By

SIR JOHN C. FOX

Late Senior Master of the Supreme Court
Chancery Division

There is no greater crime than Contempt and Disobedience, for all persons within the Realm ought to be obedient to the King and within his Peace. *Bracton.*

The Liberty of the Subject is the highest inheritance that he hath. *Selden.*

OXFORD
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1927

TO MY WIFE

IN REMEMBRANCE OF

MUCH WILLING HELP

PREFACE

THE following account is founded to some extent upon articles contributed to the *Law Quarterly Review* from 1908 to 1924.[1] The first of the series, entitled *The King* v. *Almon*, was written to show that in former times the offence of contempt committed out of court was tried by a jury in the ordinary course of law and not summarily by the Court as at present. The later articles also bear upon the history of the procedure in matters of contempt. Further inquiry confirmed the opinion originally formed with regard to the trial of contempt and brought to light a considerable amount of additional evidence which, with the earlier matter, is embodied in the following chapters, numbered I to VII.

In Chapter VIII, entitled 'Amercement and Fine', a subject not treated of in the *Law Quarterly* articles, the jurisdiction to punish offences at common law by compulsory fine, and imprisonment in addition, is discussed and contrasted with the ancient right 'to make fine' to avoid imprisonment, at the option of the offender. Chapter IX under the heading 'Almon's case in the United States' is new.

In the present undertaking I have been encouraged by the favourable reception accorded to my *Law Quarterly* Articles by Professor Holdsworth in the third edition of

[1] *The King* v. *Almon* (1908), xxiv, 184, 266; *The Summary Process to punish Contempt* (1909), xxv, 238, 354; *Eccentricities of the law of Contempt of Court* (1920), xxxvi, 394; *The Nature of Contempt of Court* (1921), xxxvii, 191; *The Practice in Contempt of Court Cases* (1922), xxxviii, 185; *The Writ of Attachment* (1924), xl, 43.

his *History of English Law*,[1] and by Professor Frankfurter and Mr. Landis in their article 'Power of Congress over procedure in Criminal Contempts' in the *Harvard Law Review*.[2] Professor Frankfurter has been so kind as to read Chapter IX and has expressed a general approval of the contents.

In the course of my duties as one of the former Editors of the *Yearly Practice of the Supreme Court*, I made a special study of 'Contempt' cases and was led on to investigate the history of the subject. This introduced me to an article by the late Mr. Solly-Flood, Q.C., on 'Prince Henry and Chief Justice Gascoigne' in the *Transactions of the Royal Historical Society*.[3] The writer of the article refers to his *History of the Writ of Habeas Corpus*, in which are extracts from the records and the Year Books of all cases of Contempt before the King's Bench from Magna Carta to the death of Henry V, and the subject is pursued down to the nineteenth century. The result convinced Solly-Flood that no instance is to be found of any committal *in poenam* by the Court of King's Bench in a summary manner and without indictment, presentment, information or arraignment, for contempt committed, even in the presence of the Court, down to the death of Henry V, and that the earliest attempt by the King's or Queen's Bench to punish contempt by attachment and examination was made in the reign of Elizabeth.[4]

A manuscript consisting of 533 closely written pages in Solly-Flood's handwriting, entitled *Abridged History of*

[1] Vol. iii, p. 391. [2] Vol. xxxvii (1924), pp. 1042–1050.
[3] (1886) Vol. iii, N. S., p. 47.
[4] Pages 445, 446 of the MS. next referred to.

the Writ of Habeas Corpus (1887), is to be found in the library of the Royal Historical Society. This contains extracts from the records and the *Year Books* and proves that the amount of labour involved in the author's researches was enormous. He estimates that the *Year Books* alone contain reports of 10,000 cases.[1] For leave to peruse the manuscript I am indebted to the kindness of Mr. Hubert Hall, the Director of the Royal Historical Society.

For the reasons given,[2] I feel obliged to differ from Solly-Flood's opinion with regard to contempts committed in the presence of the Court. I think the cases clearly prove that where the contempt was committed in the actual view of the Court, the procedure to punish was summary, from time immemorial. I think, too, that Solly-Flood was mistaken in supposing that contempts committed by officers of justice were not in early times punishable by summary process in the common law courts (see pp. 158–9, *infra*). Subject to this, I desire to acknowledge to the fullest extent my debt to that learned gentleman, the result of whose labour amongst original records is confirmed by the evidence that I have been able to gather, for the most part, from printed books.

Incidentally, some additional light is thrown on the controversy about Prince Henry of Monmouth and Chief Justice Gascoigne. The statement of Fortescue C.J. that the Court never makes a record of a committal for an 'offence done in Court' accounts for the absence of any record of that case and diminishes the evidence against its authenticity (see pp. 52, 53).

[1] Page 280 of the MS.

[2] Pages 50–2, 53, 55, *infra*.

Some day, perhaps, another Solly-Flood will arise to devote a lifetime to the examination of the records of the Courts of Common Pleas and Exchequer. That the result of such an examination will be to support the arguments respectfully submitted here, is anticipated with some confidence, having regard to the decisions and opinions of Judges and other learned persons cited in the following pages.

If some of my conclusions are not approved and I should successfully evoke the criticisms of my readers, their observations will be gratefully received and will be replied to—if not unanswerable.

I am much beholden to the Delegates of the Oxford University Press for undertaking the publication of the work, and grateful to the Library Committee of All Souls College for permission to make use of the Codrington Library.

JOHN C. FOX

GORING-ON-THAMES
February 1927.

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YEAR BOOKS

Where not otherwise indicated, the reference is to the folio edition.

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ABBREVIATED TITLES OF WORKS CITED

(The recognized abbreviations of law reports are not included in this list.)

Ann. Reg.: Annual Register.

Bac. *Abr.*: Bacon's *Abridgement.*
Baldwin: The King's Council in England during the Middle ages, by J. F. Baldwin (1913).
Biog. Jurid.: Biographia Juridica, a Biographical Dictionary of the Judges of England, by Edward Foss, 1870.
Blackst. *Com.*: Blackstone's Commentaries.
Bracton, *De legibus*: De legibus et consuetudinibus Angliae, by Henry de Bracton, edited by Sir Travers Twiss (Rolls Series), 1878–83.
Bracton, *Note Book*: Bracton's Note Book, a collection of Cases *temp.* Henry III, edited by F. W. Maitland, 1887.
Braithwaite, *Practice*: Record and Writ Practice of the Court of Chancery by T. W. Braithwaite, 1858.
Britton: edited by F. M. Nichols, 1865.
Bro. *Abr.*: La Graunde Abridgement, by Sir Robert Brooke, Chief Justice of the Common Bench (ed. 1576).

Cal. Close Rolls: Calendar of Close Rolls (Calendars of State Papers, &c.).
Cal. Pat. Rolls: Calendar of Patent Rolls (Calendars of State Papers, &c.).
Co. Litt.: Coke upon Littleton (Coke's First Institute).
Collect. Jurid.: Collectanea Juridica, *see* Hudson.

Dial. Excheq.: Dialogue of the Exchequer, by Richard Fitz-Neale, edited by Hughes, Crump, and Johnson, 1902. Translated by E. F. Henderson, Select Historical Documents, 1896.
Dicey, *Privy Council*: The Privy Council (Arnold Prize Essay, 1860), by A. V. Dicey, 1887.
Dict. Nat. Biog.: Dictionary of National Biography.

Ency. Brit.: Encyclopaedia Britannica.
Eng. Hist. Rev.: English Historical Review.

Fleta: edition, 1647.
Gent. Mag.: Gentleman's Magazine.
Glan., Glanville: Tractatus de legibus et consuetudinibus regni Angliae, by R. de Glanville (1780). Translated by J. Beames, 1812.

Hale, P.C.: Pleas of the Crown, by Sir Matthew Hale (1800).
Hansard: Hansard's Parliamentry Debates.
Harg. Tracts: A collection of Tracts relative to the Law of England, edited by Francis Hargrave, 1787.
Hawarde's *Reportes*: Hawarde's Reportes del Cases in Camera Stellata, edited by W. P. Baildon (1894).
Hawkins, P.C.: Treatise of the Pleas of the Crown, by Sergeant Hawkins (8th ed. by Curwood, 1824).

Holdsworth: History of English Law, by W. S. Holdsworth, 3rd edition.
Holt on Libel: The Law of Libel, by F. L. Holt (1812, 2nd ed., 1816).
How. *St. Tr.*: Howell's State Trials.
Hudson on the Star Chamber: Treatise of the Court of Star Chamber, by William Hudson, *temp.* Charles I (Collectanea Juridica, ii, 1).

Inst.: Coke's Institutes.

Kitchin on Courts: Jurisdictions; or lawful authority of Courts Leet, Courts Baron, &c. (ed. 1675).

L.Q.R.: Law Quarterly Review.
Lib. Ass.: Liber Assisarum (Year Books, 1–50 Edward III), folio edition.
Long Quinto: Year Book, 5 Edward IV, 'Commencement appelle Long Quinto', folio edition.

Madox: History and Antiquities of the Exchequer, by T. Madox, 1769.
Maitland, *Const. Hist. Eng.*: Constitutional History of England (Lectures), by F. W. Maitland (1908).
Mirror: The Mirror of Justices, Selden Society's Publications, edited by W. J. Whittaker with Introduction by F. W. Maitland, 1895.

P.R.O.: Public Record Office.
Parl. Hist.: Cobbett's Parliamentary History of England to 1803.
Plac. Abbrev.: Placitorum Abbreviatio, Richard I to Edward II (Record Commission, 1811).
Pollock and Maitland: History of English Law before the time of Edward I, by Sir Frederick Pollock, Bart., and F. W. Maitland (2nd ed., 1898).

Rayner's Digest: A Digest of the Law concerning Libels, by 'A gentleman of the Inner Temple' (John Rayner), 1770.
Reg. Brev.: Registrum Brevium tam Originalium quam Judicialium, 4th ed. with Appendix, 1687.
Rep.: Coke's Reports.
Roll. *Abr.*: Rolle's Abridgement.
Rot. Parl.: Rotuli Parliamentorum (Edward I to Henry VII), 1767–77.

Sanders, *Chan. Ord.*: Sanders, Statutes and Orders of the High Court of Chancery, 1845.
Scofield, *Star Chamber*: A study of the Court of Star Chamber, by Cora L. Scofield, Chicago, 1900.
Solly-Flood: see note at the head of the Appendix.
Stephen, *Hist. Crim. Law*: History of the Criminal Law of England, by Sir James Fitzjames Stephen, 1883.
Stubbs, *Charters*: Select Charters by William Stubbs, 9th ed. by H. W. C. Davis (1913).
Style, *Pract. Reg.*: Style's Practical Register (3rd ed., 1694).

Y. B.: Year Books, folio edition, when not otherwise specified.

I

INTRODUCTORY

RULES for preserving discipline, essential to the administration of justice, came into existence with the law itself, and Contempt of Court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century to the present time. In the Anglo-Saxon laws and through Domesday Book, the records of the *Curia Regis* and the Parliament, the first treatises on law and the Year Books, the development of 'contempt' in the legal sense can be traced, until by the fourteenth century the principles upon which punishment was inflicted to restrain disobedience to the King and his courts as well as other acts which tend to obstruct the course of justice, had become firmly established.

The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the Court: (*a*) enforcement of the process and orders of the Court, disobedience to which may be described as 'civil contempt', and (*b*) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the Court while it is sitting (contempt in court) or libelling a Judge or publishing comments on a pending case (contempt out of court), which are both distinguished as 'criminal contempt'.

Civil, distinguished from criminal, contempt is a wrong for which the law awards reparation to the injured party; though nominally a contempt of court, it is in fact a wrong of a private nature as between subject and subject, and the King is not a party to the proceedings to punish it. The punishment is a form of execution for enforcing the right of a suitor. Some contempts partake of both natures; such, for instance, as an offence under the Debtor's Act 1869, where the penalty implies not only

the enforcement of a civil right but also the punishment of a criminal offence.[1]

Acts of criminal contempt in the earliest age are criminal contempts to-day, but the art of printing and the publication of the newspaper have brought into prominence a form of contempt connected with the law of libel which in earlier times was represented by a few scattered cases of comment on the action of Judges. Newspaper criticism of pending proceedings is now the commonest form of criminal contempt.

The penalty imposed for all contempt of court is imprisonment and, in the case of criminal contempt, fine also.[2] The reason for this distinction, as stated by Lord Selborne, is that as contempts in disobeying the order of the court (civil contempt) cannot arise in courts purely criminal but only in courts of civil jurisdiction, the power of punishment for disobedience is by imprisonment only and not by fine.[3]

The term of imprisonment and the amount of the fine are fixed by the court, at its discretion, subject to this, that in enforcing obedience to its process and orders the Court is now governed by statutory rules which prescribe the conditions under which failure to comply is to be treated as contempt, and that in the case of disobedience to an order to pay money a maximum period of imprisonment is fixed by statute. Acts which constitute criminal contempt are defined by judicial decisions, and the jurisdiction to proceed against the wrong-doer is based on that foundation, in other words, on the common law.

The ordinary methods of trial for contempt at the present day are summary, viz. by motion or summons for attachment or committal according to circumstances. Where a criminal contempt is an indictable offence, indictment or information is available as an alternative form of procedure.[4] There can be no question that a summary

[1] See Halsbury, *Laws of England*, vii, 297.
[2] Halsbury, *Laws of England*, vii, 280.
[3] *Hansard*, 3rd ser., vol. 276, 1709.
[4] Halsbury, *Laws of England*, vii, 280, 281.

form of trial has been used for a very long period in the case of civil contempt and also in the case of criminal contempt where the act is committed in the actual view of the court or by an officer of justice. It is said that the same procedure is applicable by immemorial usage when criminal contempt is committed out of court by a stranger, but this proposition has not been tested by an appeal to history.

The modern practice of proceeding summarily to the punishment of contempt out of court has been the subject of comment and protest, but that the practice is founded upon immemorial usage, has, since the eighteenth century, been generally assumed or has not been expressly questioned by the court. Thus, Mr. Justice Blackstone, speaking of the process of attachment followed by the examination of the accused by interrogatories (a course prescribed in our day by the Crown Office Rules of 1906), remarks 'that this method of making the defendent answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance'; but he concludes 'that as the process by attachment in general appears to be extremely ancient, and has in more modern times been recognized, approved, and confirmed by several express Acts of Parliament, so the method of examining the delinquent himself upon oath with regard to the contempt alleged is at least of as high antiquity, and by long and immemorial usage is now become the law of the land'.[1]

In the year 1906 the House of Commons passed a resolution 'that the jurisdiction of Judges in dealing with contempt of court is practically arbitrary and unlimited and calls for the action of Parliament with a view to its definition and limitation', and a similar resolution was passed in 1908.[2] In the years 1883, 1892, 1894, 1896, and 1908 bills for the amendment of the law of contempt of court were brought in but failed to pass.

[1] *Blackst. Com.*, iv, 287–8. The Statutes referred to by Blackstone are discussed at pp. 19 ff., *infra*.

[2] *Hansard*, 4th series, vol. 155, 614 (April 4, 1906); vol. 185, 1432 (March 10, 1908).

In the debate on the Contempts of Court Bill of 1883, which was introduced by Lord Selborne when Lord Chancellor and passed the House of Lords, Lords Fitzgerald and Bramwell protested against the trial of 'constructive' contempts, by a summary procedure, but the protest was unheeded.[1] This bill did not touch the question of the form of trial, but was framed on the assumption that all contempts are punishable summarily. It proposed to limit the period of imprisonment for contempt to three months and the fine to £500.

According to a series of reported cases extending over the last hundred years, criminal contempts committed out of court by strangers are punishable by fine or imprisonment, or both, and by the summary process of attachment, with or without examination of the accused and without the intervention of a jury. The decisions in these cases are based on the assumption that the summary procedure has been applied in such cases from time immemorial. Whether this assumption is justified will be the subject of inquiry in the following pages. On two points, established doctrines will be attacked; proof will be offered that in early times criminal contempt committed by a stranger out of court was proceeded against like any other trespass in the common law courts, with the assistance of a jury, unless the contempt were confessed, and it will be shown that such contempt was formerly punished by those courts by imprisonment, from which the offender was entitled to obtain his discharge upon making fine, and never by a pecuniary penalty in addition to imprisonment. The evidence will show that the practice of trying contempts out of court summarily and punishing them by the double penalty was first established in the seventeenth century.

The plan proposed is, first, to consider how the matter stands to-day and on what authority, and then, by reference to earlier history, to inquire whether the modern cases are founded upon a correct interpretation of the common law.

[1] See p. 42, *infra*.

II

ALMON'S CASE

THE leading case on procedure for the punishment of contempt of court, and the root of the present practice in cases of criminal contempt, is *The King* v. *Almon* (cited here as *Almon's Case*), in which a judgement was prepared, though never delivered, by Mr. Justice Wilmot,[1] and is printed in the *Notes* of that learned Judge's *Opinions and Judgements* at pp. 243 ff. In this judgement, written in the year 1765, it is laid down that a libel on a Judge in his judicial capacity is punishable by the process of attachment without the intervention of a jury, and that this summary form of procedure is founded upon immemorial usage.

The circumstances of the case were these. In Hilary Term 1765 a rule *nisi* was obtained by the Crown to attach John Almon, a bookseller, for publishing a libel on the Chief Justice, Lord Mansfield, and the arguments took place in the following term in the Court of King's Bench, judgement being reserved. In Trinity Term the judgement in favour of granting the attachment was ready to be delivered, but the Judges discovered that the rule *nisi* had been entitled 'The King v. Wilkes' instead of 'The King v. Almon'. Mr. Justice Wilmot urged the defendant's Counsel, Serjeant Glynn, 'as a gentleman' to consent to an amendment, to which the Serjeant replied that 'as a man of honour' he could not. The proceeding had to be abandoned, and a change of ministry ensuing, another rule *nisi* which had been obtained was not further proceeded upon by the Crown.[2]

[1] Afterwards Chief Justice of the Common Pleas.

[2] John Rayner, *Digest of the Law of Libels* (1770), 137; *Memoirs of Sir J. E. Wilmot*, 2nd ed., 76; Almon's *Biographical Anecdotes*, 1, 244; *Annual Register* (1765), 177–9, and see Wilmot's *Notes*, p. 243, note.

Wilmot's *Notes* were not published until 1802, after the Judge's death and thirty-seven years after the proceedings in *Almon's Case*. The *Notes* were edited by the Judge's son, who in a preface apologizes for the imperfections of some of the cases; but in his *Memoirs* of his father, the same son shows that the judgement in *Almon's Case* 'was prepared for delivery, copied fair and corrected with the Judge's own hand',[1] so that the published copy may be taken to represent the Judge's deliberate opinion in the year 1765. It appears by an endorsement on the transcript in Wilmot's handwriting that his brother Judges would have agreed in granting the attachment.[2]

The libel upon which the proceedings were founded was contained in a pamphlet in which Lord Mansfield was accused (1) of officiously, arbitrarily and illegally making, out of court, an order to amend an information against John Wilkes, and (2) of an intention to deprive the subject of the benefit of the *Habeas Corpus* Act by introducing a rule, to be obtained upon affidavit, to show cause why the applicant should not be discharged out of custody, instead of granting a writ of course.

The pamphlet, published in 1764, was entitled *An Enquiry into the doctrine lately propagated concerning Libels, Warrants and the Seizure of Papers . . . in a Letter to Mr. Almon from the Father of Candor*.[3]

The rule *nisi* for attachment was argued before Wilmot, Yates, and Aston JJ. The Attorney General, Sir Fletcher Norton, and the Solicitor General, Mr. De Grey, supported the application for attachment, and were opposed

[1] *Memoirs of the Life of Sir John Eardley Wilmot*, by John Wilmot, 2nd ed., p. 77.

[2] *Wilmot's Memoirs*, 79.

[3] 'Candor' was said to be the favourite ministerial word in vogue during the Pelham administration, 1743–54 (*North Briton*, March 19, 1763). Later editions of the pamphlet were entitled *A Letter concerning Libels, Warrants, and the Seizure of Papers, &c.* The pamphlet, as also a later one issued in 1770 (see p. 36, *infra*), is said to have been written by Mr. Greaves, a Master in Chancery, at the desire of Lord Camden, then Chief Justice of the Common Pleas, and John Dunning, Almon's counsel (see *Rex* v. *White*, *How. St. Tr.*, xxx, 1274; *Almon's Biographical Anecdotes*, i, 244; *Walpole's Letters*, ed. Toynbee, vi, 154, 155, 169).

by Serjeant Glynn and Mr. Dunning. Three objections were taken on behalf of the defendant: (1) that publication by him was not proved; (2) that it was not shown that the libel applied to the Court or the Chief Justice; (3) that the summary procedure by attachment was inapplicable. The first two objections were overruled; upon the third it was argued for the defendant that the proceeding should have been by indictment or information, or that Lord Mansfield should have brought an action of *Scandalum magnatum*—that attachment was established to enforce obedience to the commands of courts of justice, and to apply it in the present case would extend it beyond its original limits—that a constructive contempt was a thing never heard of, and if the possibility existed it would involve such an increase of power in the Judges that no one would be safe—that the practice of granting informations for contempt went a great way, but nothing to this —that in this case the Court would exercise the province of party, judge, evidence and jury.[1] The question whether the proceedings were or were not pending when the libel was published, and how far they might be affected by the publication, was not raised, so far as appears. The proceedings in which a rule to show cause had been made instead of granting a writ of *Habeas Corpus*, had taken place several years before the alleged libel was published. The information in *The King* v. *Wilkes*,[2] in respect of which the order to amend was made,[3] had been tried, judgement pronounced and execution issued, but at the time the libel was published an application by the defendant to reverse the outlawry which had followed was pending.

Here is the judgement on the third point:

The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or

[1] John Rayner, *Digest of the Law of Libels* (1770), 137; *Wilmot's Memoirs*, 77; *Almon's Anecdotes*, i, 244; *Ann. Reg.* 1765, 177–9; and see *Wilmot's Notes*, 243 *n.*

[2] (1770) 4 Burr. 2527.

[3] *Ibid.* 2532.

not, to fine and imprison for a contempt to the court, acted in the face of it, 1 Ventris I,[1] and the issuing attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of *Magna Charta* as the issuing any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it and therefore (it) cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trial by juries do—immemorial usage and practice (Wilmot's *Notes*, 254).

Never pronounced in court, this extra-judicial opinion did not possess the binding effect of a decision, but it acquired the singular distinction of becoming a leading authority by citation and approval in subsequent cases, the earliest of which was decided fifty-six years after the opinion was written. No higher testimony to Mr. Justice Wilmot's reputation for learning and ability could be given than this, that his opinion was adopted by succeeding Judges without question and without examination of earlier authorities. The opinion, which fills 29 quarto pages of 'English' type, deserves to be studied at length. Here, it must be sufficient to refer shortly to the reasons upon which it is based so far as regards the summary procedure to punish contempt.

The learned Judge does not agree with the suggestion of Chief Baron Gilbert,[2] that the origin of commitment for contempt is derived from the Statute of Westminster II, c. 39,[3] but considers that the statute, which empowers the Sheriff to imprison persons resisting process, has nothing to do with giving courts of justice power to

[1] *Sparks* v. *Martin* (1668).

[2] *History of the Common Pleas*, 1st ed., p. 20.

[3] Cited in Wilmot's judgement as 'the Statute of Westminster, ch. 2'.

vindicate their dignity, though it confirms the law of the land from which the power to commit for contempt is derived (Wilmot's *Notes*, 253, 254). The learned Judge argues that if resistance to a minister of the Court is punishable by attachment, *a fortiori* libelling a Judge in his judicial capacity is so punishable. Citing the case of *Floyd* v. *Barker* in 1608,[1] he points out that by our constitution the King is the fountain of justice and that he delegates his power to the Judges. Wilmot contends that arraignment of the justice of the Judges is arraigning the King's justice; that it is an impeachment of his wisdom in the choice of his Judges; that it excites dissatisfaction with judicial determinations and indisposes the minds of people to obey them; that this is a most fatal obstruction of justice and calls for a more immediate redress than any other obstruction (Wilmot's *Notes*, 255). Speaking contumelious words of the rules of the Court, for which attachments are constantly granted, is contrasted with printing virulent and malignant scandal upon the Judges themselves. The Judges are not vindicating their own cause but the cause of the public. The advantage of a trial by attachment over a trial by jury is pointed out. On attachment the party can acquit himself by his own oath, whereas a jury may convict him on false evidence. The recent Court Martial case[2] is referred to on the procedure by writ of *Scandalum magnatum* which is only to redress the private injury and not penal in its object. As to proceeding in the House of Lords for breach of privilege, the scandal does not affect Lord Mansfield as a peer, and if it did, that method of procedure is not more favourable to the accused than attachment. As to proceeding by indictment or information, the learned Judge declares himself a friend to trial of facts by jury, but if to prevent indignities to courts of justice and to preserve their lustre and dignity, it is a part of the legal system that dilinquents should be called upon to answer summarily, the Court is as much bound to execute this part of the system as any other. Trials by juries will be buried in

[1] 12 Rep. 23.

[2] See p. 14, *infra*.

the same grave with the authority of the courts who are to preside over them. Is it possible, says Wilmot, to stab that authority more fatally than by charging the court, and more particularly the Chief Justice, with having introduced a rule to subvert the constitutional liberty of the people? (*ibid.*, 256–9). If a bailiff's follower is abused when executing process, the Court is to grant an attachment, but when the Judges are represented to the people as acting corruptly, illegally or oppressively, they must wait at the door of the Grand Jury Chamber with their indictments in their hands and attend the trial in order to get that justice which the meanest person in the kingdom, acting under their authority, has a right to by attachment (*ibid.*, 268). If it be said that no argument can be drawn from the last-mentioned comparison because abuse in the actual service of process differs from a libel, the principles on which the Court proceeds in either case must be considered. In the case of the bailiff the execution of the law is facilitated by immediate redress and protection, but the principle upon which attachments issue for libels upon courts is of a more enlarged and important nature; it is to keep a blaze of glory around them and to deter people from attempting to render them contemptible in the eyes of the public. A libel upon a bailiff terminates only in the defamation of a private individual, but a libel upon a court is a reflection upon the King and telling the people that the administration of justice is in weak or corrupt hands, that the fountain of justice is tainted and consequently that judgements which stream out of that fountain must be impure and contaminated. An attachment for a libel upon a judge for what he does at chambers does not proceed upon any principle analogous to the case of a libel upon a bailiff, but falls within the principle of libelling the Court, which is imputing to the King a breach of that oath which he takes at the coronation to administer justice to his people (*ibid.*, 269–71).

Selden remarks that the reason of a thing is not to be inquired after till you are sure the thing itself be so and

makes his meaning clear by a homely illustration.[1] The test may be applied to Mr. Justice Wilmot's opinion in *Almon's Case.* The propriety of trying a libel on the court summarily and the advantages which follow from that course are dwelt upon at length, but if we inquire whether this form of trial is sanctioned by law in a case of contempt committed out of court, the answer rests principally on the unsupported statement of the learned Judge that such is the law. He cites the following authorities:

(1) *The Statute of Westminster II, chapter* 39, and *Gilbert's History of the Common Pleas* (see p. 8, *supra*).

The thirty-ninth chapter of this statute provides that if the Sheriff's bailiffs testify that they have been resisted in executing process, the Sheriff shall go in proper person to do execution; and if he find his under-bailiffs [false, he shall punish (*puniat*) them by imprisonment, so that others by their example may be restrained (*castigentur*); and if he do find them] true, he shall restrain (*castiget*)[2] the resisters by imprisonment, from whence they shall not be delivered without the King's special commadment.

Chief Baron Gilbert quotes this passage, omitting the portion here enclosed in square brackets, and makes the following comment:

> The original of commitment for contempt seems to be derived from this statute; for since the Sheriff was to imprison those that resisted the process, the Judges that awarded such process must have the same authority to vindicate it; hence, if any one offers any contempt to the process, either by word or deed, he is subject to commitment during pleasure, viz. *a qua non deliberentur sine speciali precepto domini regis*; so that notwithstanding the statute of *Magna Charta*, that none are to be imprisoned, *nisi per iegale iudicium parium suorum vel per legem terrae*, this is one part of the law of the land to commit for contempts, and confirmed by this statute (Gilbert, *Hist. Com. Pleas*, 20).

[1] ''Twas an excellent question of my Lady Cotton when Sir Robert Cotton was magnifying of a shoe which was Moses's or Noah's, and wondering at the strange shape and fashion of it: But, Mr. Cotton, says she, Are you sure it is a shoe?' (*Table-Talk*, under 'Reason').

[2] In the Statutes of the Realm 'castigentur' is translated 'may be reformed'; 'castiget', 'he shall punish'.

As pointed out by Wilmot, the Chief Baron's statement that the original of commitment for contempt seems to be derived from this statute is inconsistent with his later statement that it is part of the law of the land to commit for contempts and confirmed by the statute. Wilmot rejects the former assertion and concurs in the later one. But the Chief Baron omits to notice the concluding words of the statute, which are instructive on the point of procedure:

> And if per case the Sheriff when he cometh do find resistance, he shall certify to the Court the names of the resisters, . . . and by a writ judicial they shall be attached by their bodies to appear at the King's Court; and if they be convict of such resistance, they shall be punished at the King's pleasure (*secundum quod domino regi placuerit*), neither shall any officer of the King's meddle in assigning the punishment, for our Lord the King hath reserved it specially to himself, because that resisters have been reputed disturbers of his peace and of his realm.[1]

It is submitted upon the words of the statute that the power conferred upon the King's Court was to sentence the resisters of the Sheriff, only after they had been attached to appear and had then been tried and convicted. This implies a trial in the ordinary course of law; and if, as the Chief Baron says, the Judges could not have less authority than the Sheriff, it must be concluded that the Sheriff's committal of the resisters was only *ad respondendum* and to await the King's direction. It would be unreasonable to suppose that the Sheriff could pronounce sentence, without previous trial, on the resisters of his bailiffs, of whose guilt he had not visible proof, whereas in the case of those who resisted the Sheriff himself he was to certify them to the King's Court for trial. Whatever the Sheriff's procedure might be, it is clear that the jurisdiction conferred on the King's Court was to try in the ordinary course of law, and the Sheriff's power could not be greater. The bailiffs whom the Sheriff might find to have reported falsely, were in a different position from the resisters, being officers of the law and on that account subject to be punished summarily. The statute distin-

[1] Cf. Bracton, *De Legibus*, fo. 442 b.

guishes between the false bailiffs and the resisters; the Sheriff was to punish (*puniat*) the former and correct or restrain (*castiget*) the latter. The Sheriff might send his bailiffs to prison and might no doubt release them at his discretion; the resisters could only be delivered by the King's special command.

This chapter of the Statute therefore proves, not that there existed at that period a summary procedure by attachment to punish contempt committed by strangers out of court, but that the writ of attachment was merely process to bring the accused before the court, there to be put on their trial in the ordinary course of law, and if they were 'convict', to be punished at the King's pleasure. Coke remarks on this passage in the statute: 'That is, according to that which shall be upon due proceeding adjudged *coram rege*, in the King's court of justice';[1] he says nothing about a summary procedure. With regard to the phrases 'at the King's pleasure', 'at the King's will', and 'without the King's special commandment', see pp. 186 ff., *infra*.

(2) *The King* v. *Wilkie*.—The next authority referred to is a case in the Common Pleas, in which that Court had lately refused to grant an attachment for a libel upon itself.[2] It appears from a contemporary writer that the case in the Common Pleas is *The King* v. *Wilkie* (Mich. Term, 1764), in which a rule *nisi* for attachment was granted against the defendant for publishing a statement that the decision of Chief Justice Pratt (afterwards Lord Camden) to discharge Wilkes from confinement, upon *Habeas Corpus*, was 'precipitate and inconsiderate, injudicious and erroneous'. The rule was never made absolute.[3] Wilmot, though unacquainted with the case referred to, is satisfied that if such a complaint as that against Almon had been laid before the Court of Common Pleas, that Court would have acted as the King's Bench now proposed to do.[4] But the learned Judge may have been mistaken.

[1] 2 Inst. 454.
[2] Wilmot's *Notes*, 253.
[3] Rayner, *Digest of the Law of Libels* (1765), 137, 139.
[4] Wilmot's *Notes*, 262.

It will be shown that in several instances there was a difference of opinion between the King's Bench and the Common Pleas as to the summary procedure to punish contempt.[1]

(3) *Sparks* v. *Martin*.—The next authority cited by the learned Judge is '1 Vent. I', to support the proposition that it 'is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court acted in the face of it'.[2] The case thus referred to is *Sparks* v. *Martin* in the King's Bench in 1668, where it was decided that the Court of Admiralty, though not a court of record, might fine and imprison for contempt in the face of the court. The prohibition to the Admiralty Court sought for and refused, was afterwards granted on another ground. This decision stands alone against the general weight of judicial opinion that a court not of record has no power to fine or imprison. See *Thomlinson's Case* (1604), 12 Rep. 104; *Griesley's Case* (1588), 8 Rep. at fo. 38 b; *Godfrey's Case* (1614), 11 Rep. 43 b; 2 Inst. 311; Hawkins, *P. C.*, Bk. II, ch. i. 14; *Blackst. Com.* iii. 24.

(4) *Floyd* v. *Barker*.—The next authority cited is *Floyd* v. *Barker*, 12 Rep. 23, a Star Chamber case, which explains the King's delegation of his powers to the Judges.[3]

(5) *The Court Martial Case*.—The next case cited is that of the members of the Court Martial who had libelled the Chief Justice of the Common Pleas.[4] In the year 1746 these gentlemen addressed to the Admiralty a letter reflecting on Sir John Willes, Chief Justice of the Common Pleas. The Judge threatened an action of *Scandalum Magnetum* but, instead, accepted an apology which was inserted in the *London Gazette*. No proceedings were taken to punish the offence as a contempt.[5]

No other authority is cited by the learned Judge and

[1] See pp. 88 ff., *infra*.
[2] See p. 8, *supra*.
[3] See p. 9, *supra*.
[4] See p. 9, *supra*.
[5] Rayner's *Digest of the Law of Libels* (ed. 1770), 132–6; *Gent. Mag.*, xvi, 462–4, 598, 630; *London Gazette*, Nov. 15, 1746.

the absence of authority weighs against his argument. But, beyond this, the records of the Court, the Year Books and other reports, and the early treatises on law abound in cases of contempt and its punishment, and with the exception of those mentioned above, the learned Judge refers to none of them. He says that he has examined very carefully to see if he can find any traces of the introduction of attachment for contempt but can find none. Yet it is upon Wilmot's unsupported statement that the jurisdiction 'is as ancient as any other part of the common law', that the existing law as laid down in subsequent cases is founded. It remains to be considered whether upon examination of the earlier cases Wilmot's doctrine can be substantiated.

III

AFTER *ALMON'S CASE*

THE later cases of contempt out of Court, to which the summary procedure sanctioned by the opinion of Mr. Justice Wilmot was applied, are next to be considered. Only two such cases have been found from the date of *Almon's Case* (1765) to the end of the eighteenth century; both of these proceeded from libels on Lord Mansfield published in the *North Briton*, one on May 28, 1768, and the other on June 3 in the same year. In the case of *William Bingley*, the earlier of the two, the defendant on being attached refused to answer interrogatories and lay in prison for nearly two years, after which he was discharged upon the application of the Crown and no further proceeding was taken against him in respect of the alleged libel. Arguments arising out of this case, against the application of the procedure by attachment, will be referred to presently.[1] The other case is that of *Steare*, who was attached, examined upon interrogatories, reported in contempt and sentenced to imprisonment by the Court of King's Bench.[2]

A different course of procedure was adopted by the Crown in *Rex* v. *Watson* (1788),[3] where one Hurry, having been prosecuted for perjury by the defendant, recovered £3,000 damages from him for malicious prosecution. The Corporation of Norwich, of which the defendant was a member, voted him £2,300 towards the damages, declaring he had been actuated by motives of public justice in the prosecution. The Court of King's Bench held this to be a libel on their proceedings and granted an information against members of the Corporation. Another instance, which seems to show that the practice of proceeding by attachment for a libel on the Court had

[1] Page 35. [2] Howell's *State Trials*, viii, 60. [3] 2 T. R. 199.

been abandoned for the time, occurred in 1808. The proprietor and printer of a newspaper were tried by information for a libel on the Judge and jury in a murder case; the defendants to the information were found guilty and sentenced to three years' imprisonment. Grose J. directed the jury that if the libel was written, not to elucidate the truth, but to injure the characters of individuals and to bring into hatred and contempt the administration of justice, the defendants ought to be convicted.[1]

In 1799 an application was made to the King's Bench for a *Habeas Corpus* to discharge one Flower who had been committed by the House of Lords and fined £100 for a libel on a member of the House. In refusing the application Lord Kenyon C.J. says that the claim to fine and imprison summarily is not peculiar to the House of Lords; it is frequently exercised by the King's Bench and other courts of record, and that, not merely for contempts committed in the presence of the court; one instance of which was that of an Under-Sheriff[2] for contempt in not executing part of the sentence pronounced on Dr. Shebbeare.[3]

Lord Kenyon asks: 'Have we not seen a thousand instances of attachment for contempts not committed *in facie curiae* merely?' He relies much on *Rex* v. *Beardmore*, but this case does not support the claim to a general jurisdiction to fine and imprison on summary process for contempts out of Court. Beardmore was an officer of justice and therefore subject to a disciplinary jurisdiction which did not apply in the case of a stranger; he admitted that he allowed Dr. Shebbeare to stand looking through the pillory instead of fixing his head and arms in it. There was in fact more than this, and it clearly appeared

[1] *Rex* v. *White* (1808), 1 Campbell, N.P. 359 *n.*

[2] *Rex* v. *Beardmore* (1759), 2 Burr. 792.

[3] *Rex* v. *Flower* (1799), 8 Term Rep., 314; 27 *How. St. Tr.* 985. Of this case Sir Samuel Romilly remarks that the judgement was pronounced with great intemperance and is entitled to no weight. (*Memoirs of Sir S. Romilly*, ii, 316; and see his speech in the House of Commons in 1810: *Hansard*, 1st Series, xvi, 484.)

that the Under-Sheriff allowed the execution of the sentence to be turned into a farce. Wilmot J., one of his Judges, applied a phrase from the *Year Books* to designate the nature of the offence: *Quantum in se fuit non permisit regem regnare.* The offence in this case was distinguishable in another aspect from contempt by a stranger out of court; it was disobedience to a rule of court, a form of contempt which from an early period was punished summarily.

Mr. Justice Blackstone enumerates the various classes of contempts and, amongst them, contempts by speaking or writing contemptuously of the court or Judges acting in their judicial capacity and by printing false accounts of pending causes. He adds: 'The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves. . . . A power therefore in the supreme courts of justice to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal' (*Commentaries*, iv, 286).

Blackstone cites the remarks of Chief Baron Gilbert on the Statue of Westminster the Second, Chapter 39, and, like Wilmot,[1] comes to the conclusion that Gilbert was wrong in attributing the derivation of the summary process to punish contempt, to this statute. Quoting the 39th chapter, more at length than Gilbert, Blackstone refers to the attachment and conviction of those who resist the Sheriff himself, as if Gilbert had cited this as an instance of summary commitment. Blackstone thinks that it was such an instance, but in fact Gilbert omits to notice this portion of the statute (see p. 12, *supra*, and *Blackst. Com.*, iv, 286).

In a later passage (p. 288), still under the head of 'Summary convictions', Blackstone repeats that the process of attachment in general appears to be extremely ancient and cites *Year Books*, 20 Henry VI, fo. 37 and 22, Edward IV, fo. 29. The earlier case cited is that of

[1] See p. 8, *supra*.

an Attorney sentenced upon attachment and examination for malpractice. This case was governed by the Statute 4 Henry IV, c. 18, and, apart from this, the Attorney would have been subject to a special disciplinary jurisdiction as an officer of justice. In the later case cited by Blackstone, (prohibition) the Ordinary was adjudged guilty of contempt, upon his admission of the facts, for disobedience to a writ requiring him to absolve the plaintiff from excommunication. Where, upon an attachment, the facts were in dispute, a jury was summoned, as appears by the following record:

Thomas persona de Swyndon attachiatus fuit ad respondendum Sanson Foliot quare est secutus placitum in curia christianitatis . . . contra prohibitionem domini regis etc. unde predictus Sanson dicit . . . Et Thomas venit . . . et de hoc ponit se super patriam . . . Et ideo preceptum est vicecomiti quod faciat inquisitionem et eam venire faciat a die pasche in quinque septimanis. Postea venit inquisitio que talis est quod iuratores dicunt super sacramentum suum quod . . . Et quia predictus Thomas gratis se posuit in inquisitionem istam et per eandem inquisitionem convictum est quod idem Thomas . . . contra prohibitionem domini regis. Et Thomas non fuit presens. Ideo consideratum est quod Thomas sit inde in misericordia et reddat predicto Sampson (*sic*) viginti marcas quas versus eum disrationavit pro dampnis suis. Et preceptum est vicecomiti quod de terris et catallis ipsius Thome faciat illas viginti marcas et illas faciat haberi predicto Sanson (*Curia Regis roll* M. 25 Henry III, m. 5, Wilts.).

Attachment was a form of mesne process to put a man upon his trial in the ordinary course of law.

Blackstone tells us further (p. 288) that the process of attachment in general 'has in more modern times been recognized, approved, and confirmed by several express Acts of Parliament', and cites certain statutes, upon which the following observations are submitted:

(1) *43 Elizabeth, c. 6.* This statute provides that the makers and procurers of warrants for arrest or attachment, not having an original writ or process, shall be sent for by attachment and, if convicted by confession, examination on oath, or the evidence of witnesses, the offenders shall be punished by the Judges as therein provided. If a

common law power to punish contempts summarily had existed, this statute would have been unnecessary. The statute will be further considered in dealing with the subject of trial by examination (see pp. 81, 82, *infra*).

(2) *13 Car. II, st. 2, c. 2, s. 4.* This section provides that the requirements of the Act that a writ shall express the cause of action and fixing the amount of security for appearance, shall not extend to, *inter alia*, writs of attachment for contempt; and that such lawful course be taken for security for appearance therein as had been theretofore used. The Act applies in cases in which contempt is by law punishable by attachment and throws no light on the question what those cases are.

A writ of attachment expressing the cause of complaint in general terms *ad respondendum nobis de quibusdum transgressionibus et contemptibus in curia nostra coram nobis illatis*, seems to have been framed to correspond with this provision of the Act. The form of writ is quoted at p. 68, *infra*. No similar form is to be found in the Register of Writs.

(3) *9 & 10 William III, c. 15.* This Act makes agreements to submit to arbitration and to have the submission made a rule of court binding on the parties; and in case of disobedience to such arbitration the party refusing to perform the same is to be subject to the penalties of contemning a rule of court.

(4) *12 Anne, st. 2, c. 14, s. 5* (Popish recusants). Section 5 gives the Court power to examine patrons and clerks in certain cases, and upon their refusal to make discovery to punish them as persons guilty of contempt of court.

The recognition, approval, and confirmation of the process of attachment in general by these four statutes to which Blackstone refers, do not help to prove the existence of a power by common law to punish contempts out of court summarily.

In Blackstone's notes for his lectures as Vinerian Professor[1] is a passage, not reproduced in the *Com-*

[1] The MS. in the Professor's handwriting is preserved in the Law Society's Library (see vol. iv, lecture 10).

mentaries, which has a bearing on the summary procedure in the case of contempts. He says:

> The jurisdiction of the Court of King's Bench in gross misdemeanours, such as assaults, battery, libels, &c., has succeeded to that of the Star Chamber, with this difference, however, that the fact is always tried by a jury in the Court of King's Bench, whereas in the Star Chamber it was tried by the Judges only.

Wilmot argues[1] that a trial by examination is more favourable to the accused than a trial by jury because if he is innocent he will be acquitted by his own oath, whereas a jury may convict him upon false evidence. The learned Judge omits to notice that, though an innocent man under examination upon attachment may acquit himself by his oath, he is still liable to be prosecuted for perjury[2] and may be convicted by false evidence in that case. He is then worse off than the man who is convicted of contempt by a jury in the first instance, for, in effect, he is found to have committed a double offence.

If the passage in Blackstone's *Commentaries* (Book IV, chapter 20, section iii) dealing with attachment for contempt be compared with Wilmot's undelivered judgement, some resemblances both in phrase and matter will be noticed, and it is not improbable that Blackstone received advice from Wilmot on the subject.[3] This section of the *Commentaries* does not appear in the manuscript notes of the lectures on which they were founded[4] and we know that Blackstone submitted the proofs of part of the *Commentaries* to Wilmot for perusal.[5]

The next case to be considered is *Ex parte Jones*[6] before Lord Erskine, C., in 1806. The committee of a lunatic and his wife had published a pamphlet reflecting

[1] See p. 9, *supra*.

[2] *Wright* v. *Mason* (1723), 8 Mod. 109; *Blackst. Com.*, iv, 287.

[3] Compare e.g. pp. 283–8 of the 4th volume of the *Commentaries* (published in 1769) with pp. 253–5 and 259 of Wilmot's undelivered judgement which was composed in 1765.

[4] Notes of the lectures referred to *supra* (p. 20). The lectures began in 1758. (*Blackst. Com.*, i, 28 *n.*)

[5] *Wilmot's Memoirs*, 201.

[6] 13 Ves. 237.

upon persons acting in the management of the lunatic's affairs under orders, and a petition was presented to commit them for the contempt. The Lord Chancellor held on the authority of *Roach* v. *Garvan*[1] that this was a high contempt and the committee and his wife and the printer were committed. His lordship pointed out that *Roach* v. *Garvan* was a case of constructive contempt, and that whatever might be said as to a constructive contempt, in the case before him the object to obstruct was avowed.

In *Roach* v. *Garvan* (*supra*), Lord Hardwicke, C., sitting in the Court of Chancery, committed the publishers of a libel on the parties relating to the proceedings in the suit. The Lord Chancellor says: 'A libel must also be a contempt to give this Court cognizance' and, enumerating the different sorts of contempts, his lordship says: 'One kind of contempt is by scandalizing the Court itself.' This accords with the doctrine laid down by Wilmot J. in *Almon's Case*. *Roach* v. *Garvan* was not in print when Wilmot wrote his undelivered judgement in 1765, for the second volume of Atkyns in which Lord Hardwicke's decision is reported was not published until 1767. It would seem that Wilmot was not acquainted with Lord Hardwicke's decision at the time he wrote, for he refers to contempts by abuse of officers of the Court of Chancery, less in point.[2] But the practice of the Court of Chancery, if cited, would not have proved a common law power.[3]

The next case is that of Sir Francis Burdett, committed by the House of Commons in 1810 for a libel on the House. Though not possessing the weight of a judicial decision, the Report of the Select Committee in this case is of value as recording the result of a search for precedents under the direction of eminent lawyers and for the bearing it has on the punishment of libels on courts of justice.[4] The Committee was appointed under

[1] (1742) 2 Atkyns, 469. Also cited as *Re Read and Huggonson* and *The St. James's Evening Post Case*. [2] See Wilmot's *Notes*, 269.

[3] See further on *Roach* v. *Garvan* and the practice of the Court of Chancery in cases of contempt, pp. 101 ff., *infra*.

[4] The Report is printed in *Howell's State Trials*, viii, 14.

the following circumstances. The action of the House in committing to Newgate a person not a member for breach of privilege, was censured by Sir Francis Burdett, then member for Westminster, in a letter to his constituents, upon which he was committed to the Tower for breach of privilege.[1]

The legal members of the Committee were Sir William Grant (Master of the Rolls), Sir Vicary Gibbs (Attorney General), Sir Thomas Plumer (Solicitor General), Spencer Perceval (ex-Attorney General), and Archibald Campbell-Colquhoun (Lord Advocate). Sir Samuel Romilly (ex-Solicitor General) was also a member, but absented himself because he differed from the conclusions of the other members.[2]

A portion of the undelivered judgement in *Almon's Case* is set out verbatim in an appendix to the report of the Committee, and the following extract from the report itself proves that the Committee relied very much on Mr. Justice Wilmot's opinion. The Committee find that the power to commit for a libel on the House

> is as much within the meaning of these words 'the law of the land' [in *Magna Carta*] as the universally acknowledged power of commitment for contempt by the courts of justice in Westminster Hall, which courts have inherent in them the summary power of punishing such contempts by commitment of the offenders without the intervention of a jury.
>
> Your committee therefore are of opinion that this power is founded on the clearest principles of expediency and right, proved by immemorial usage, recognized and sanctioned by the highest legal authorities and analogous to the power exercised without dispute by courts of justice; that it grew up with our constitution; that it is established and confirmed as clearly and incontrovertibly as any part of the law of the land and is one of the most important safeguards of the rights and liberties of the people.

An appendix to the report contains a list of cases of alleged summary commitment for contempt by courts of justice of which the following are particulars:

(1) A. D. 1344, Mich. Term, 18 Edward III. *John de*

[1] *Memoirs of Sir Samuel Romilly*, ii, 314; *Dict. Nat. Biog.* under 'Charles Philip Yorke', 'John Gale Jones', and 'Sir Francis Burdett'.

[2] *Hansard*, 1st ser., xvii, 8.

Northampton's Case. John, an attorney, confessing that he had written a letter to one of the King's Council reflecting on the Judges of the King's Bench, the latter Court adjudged that the letter was a scandal upon the Court and John was committed to the Marshal and afterwards found sureties for his good behaviour. Coke cites this case (3 Inst. 174), and there is nothing in his account to suggest that there would not have been a trial by jury if the accused had not confessed. Holt in his book on *Libel* cites it as a case of indictment.[1] Whatever the nature of the procedure, the case does not support the claim to a jurisdiction to try without a jury a stranger accused of libelling the Court, who pleads not guilty. John was an attorney and so subject to the special disciplinary jurisdiction of the Court.

(2) A. D. 1713, Hil., 11 Anne. *Lawson's Case.* Attachment for speaking disrespectful words of the Queen's Bench on being served with a rule of Court.

Whether attachment for abusing a process server or speaking disrespectfully of the process or the Court from which it issues was an innovation upon ancient practice, will be discussed in connexion with the history of trial by examination.[2] Certainly, the fact that the practice was established by the eighteenth century does not prove immemorial usage and, apparently, the Select Committee were unable to dicover an earlier instance. This offence is distinct from other contempts committed out of Court, such as libelling the Court, in that it involves a direct obstruction to the course of justice. The summary punishment in such a case probably originated in the notion that the offence was committed in the presence of the Court.

(3) A.D. 1714, Hil. Term, 12 Anne. *Hendale's Case.* Attachment for speaking disrespectfully of a Judge and his warrant. See No. (2).

(4) A. D. 1719, Trinity Term, 5 George I. *Jones's Case.*

[1] 1st ed. (1812), 137; 2nd ed. (1816), 153. The original record is missing.

[2] See pp. 108 ff., *infra.*

Attachment for treating the process of the King's Bench contemptuously. (1 Strange 185.) See No. (2).

(5) A.D. 1719, Mich. Term, 6 George I. *Lamb's Case.* Attachment for contemptuous words concerning a warrant from a Judge of the King's Bench. See No. (2).

(6) A.D. 1722, Easter Term, 8 George I.[1] *Wilkin's Case.* The defendant having confessed himself guilty of publishing a libel on the King's Bench, was committed, fined, and ordered to give security for his good behaviour.

(7) A.D. 1721, Hil. Term, 7 George I. *Barber's Case* (1 Strange, 444). Attachment for contemptuous words of the King's Bench.

(8) A.D. 1723, Easter Term, 9 George I. *Dr. Colbatch's Case.* Having been attached and examined upon interrogatories for contempt in publishing reflections on the King's Bench, Dr. Colbatch was committed, fined, and ordered to give security for his good behaviour.[2]

(9) A.D. 1724, Mich. Term, 11 George I.[3] *Bolton's Case.* Attachment for contemptuous words respecting a warrant of the Chief Justice of the King's Bench, spoken by the defendant at a meeting of his parishioners.

(10) A.D. 1723, Easter Term, 9 George I. *Wiatt's and Middleton's Cases* (*Rex* v. *Wiatt*, 8 Modern, 123; *Rex* v. *Middleton*, Fortescue, 201). Wiatt, a bookseller, published a pamphlet written by Dr. Middleton in which were passages reflecting upon a proceeding in the King's Bench. A rule *nisi* for attachment was granted against Wiatt, and discharged upon payment of costs. Proof having been given that Dr. Middleton was the author, an attachment issued against him; he was adjudged to be in contempt upon his confession, committed to the Marshal, and bound to his good behaviour.

(11) A.D. 1731, Mich. Term, 5 George II. *Lady Lawley's Case.* For contempt in publishing a paper reflecting

[1] In the Report of the Committee the year is incorrectly given as 6 George I. See Monk, *Life of Bentley*, 489.

[2] Monk, *Life of Bentley*, 490.

[3] In the Report of the Committee the date is incorrectly given as 9 George I. See K.B. Misc. 32/18, Interrog. on Contempts, 1714–33, P.R.O.

upon the Court of King's Bench, an attachment issued against Lady Lawley. She was examined upon interrogatories, reported to be in contempt, and committed, and, having made submission, was fined and discharged.

The above cases, Nos. (6) to (11), all involve libel or slander on the Court by strangers, unconnected with the service of process, and will be further discussed in connexion with the subject of trial by examination.[1]

(12) A.D. 1742, Mich. Term. *Roach* v. *Garvan* (2 Atkyns, 469). This is the case before Lord Hardwicke, C., referred to at p. 22.

(13) A.D. 1806. *Ex parte Jones* (13 Ves. 237). This is the case before Lord Erskine, C., referred to at page 21.

(14) A.D. 1765. *The King* v. *Almon* (Wilmot's *Notes*, 243). The Committee insert a long extract from the written judgement of Mr. Justice Wilmot.

(15) A.D. 1768, Trinity Term, 8 George III. *Steare's Case.* This case is referred to at p. 16 and is indistinguishable from Almon's.

The Committee's search for judicial precedents to prove immemorial usage resulted in the discovery of:

(*a*) one case in the reign of Edward III, not proved to have been tried otherwise than in the ordinary course of law;

(*b*) no other case before 1713;

(*c*) six cases in point in the eighteenth century, earlier than *Almon's* (the first in 1721);

(*d*) one case in point in 1768;

(*e*) the undelivered judgement in *Almon's Case.*

It was established that the practice of attachment for libelling the Court had been followed or adopted by the Court of King's Bench whilst under the presidency of Chief Justices Sir John Pratt and Lord Raymond, but when the Committee made its Report in 1810 the case for immemorial usage remained (but for *Steare's Case*) where Mr. Justice Wilmot had left it. The result of the search provides negative evidence of value against the existence of such usage.

[1] See pp. 111 ff., *infra.*

In applying the summary process in and after the year 1721, the courts were perhaps unconsciously reflecting the practice of the House of Commons in the later Stuart period, when commitment for breach of privilege by libels was frequent.[1] In the case of the Kentish petition[2] a Committee of the House reported their opinion that to assert the House of Commons has no power of commitment but of its own members tends to the subversion of the constitution of the House, and that to print or publish any books or libels reflecting upon the proceedings of the House, or any member thereof for or relating to his service therein, is a high violation of the rights and privileges of the House. At the conference between the two Houses in the case of *Ashby and White* in 1701 the Commons reasserted their right to commit for breach of privilege persons not members of the House, and the Lords in answer said that they never disputed that right.[3] While the Select Committee in *Burdett's Case* in 1810 based its argument for the right to commit for libels on the analogy of the superior courts of justice, the fact was that in 1721 the courts were following the example of the House of Commons in asserting a summary jurisdiction.

In 1811, in the case of *Burdett* v. *Abbot*,[4] Sir Francis Burdett brought an action in the King's Bench against the Speaker for assault and false imprisonment. In his judgement (p. 138) Lord Ellenborough assumes, without citing authority on the point, that the superior courts of law have power to punish, summarily, libels on themselves as contempts. In this case the Attorney General, Sir Vicary Gibbs, referred in his argument both to the opinion in *Almon's Case* and to the Report of the Select Committee (pp. 85, 87).

Almon's Case was judicially considered in the case of *Taaffe* v. *Downes* before the Common Pleas in Ireland in 1813.[5] Mr. Justice Mayne claims for Wilmot's written

[1] See appendix A to the *Report of the Select Committee in Burdett's Case.* [2] *Commons' Journals* (1701), xiii, 767.

[3] *Lords' Journals* (1701), xvii, 709, 714. [4] 14 East, 1.

[5] 3 Moore, P. C., 36 *n.* A full report of this case by John Hatchell was published in 1815.

judgement that it ought to carry as much weight as other great men's commentaries,[1] and Chief Justice Lord Norbury speaks of Wilmot's *Notes* as being of high authority in Westminster Hall.[2] The point on which *Almon's Case* was cited in *Taaffe* v. *Downes* was whether the warrant of a Chief Justice is issued by him in a judicial or extra-judicial capacity. Mr. Justice Fletcher, differing from the other members of the Court, deals at length and in very remarkable language with the volume of Wilmot's *Notes* and with *Almon's Case* in particular. He comments unfavourably upon the written judgement, pronouncing it to be 'the hasty and warm ebullition of a mind fraught with arbitrary notions, irritated and excited by a severe attack upon his whole Court, especially upon his venerated and adored Chief Justice, and the very reverse of what it is called—a considered, digested, and ulterior opinion'.[3] Mr. Justice Fletcher declines to be bound by what he describes as 'a mere unconnected, unsupported *dictum*'. Wilmot, he says, 'is not so infallible that the Judges of this Court are bound to surrender their judgements and implicity to follow his *dictum* against authority and principle, in a case of as much importance and involving consequences as vital, as any that has ever engaged the attentions of a court of law'.[4]

The first reported case in an English court, in which the undelivered judgement in *Almon's Case* was cited and adopted by the Court, is *Rex* v. *Clement* (1821),[5] which came before the Court of King's Bench on a rule to show cause why a writ of *Certiorari* should not issue to the Justices of the delivery of the gaol of Newgate to remove into the King's Bench all orders relating to the defendant. There had been successive trials before Abbott C.J. of several persons for treason on similar facts, and the Court had issued a general order that no report of the proceedings should be published until all the trials had taken

[1] Page 186 of the full report. [2] *Ibid.*, 216. [3] *Ibid.*, 159.

[4] *Ibid.*, 160. The judgement of Fletcher J. occupied nearly five hours in the delivery (p. 176). The Judge's references to *Almon's Case* are at pp. 143–60.

[5] 4 Barn. & Ald. 218.

place. Before all the trials were concluded the defendant published an account of one of them in the *Observer* and upon a summary application was fined £500 for contempt. The rule was argued before Abbott C.J., and Bayley, Holroyd, and Best JJ. and was discharged by the unanimous decision of the Court on the ground that the restraining order was regular and that an indictment for the contempt was unnecessary. Holroyd J. (who had been counsel for the plaintiff in *Burdett* v. *Abbot*)[1] says in the course of his judgement in *Rex* v. *Clement*: 'In the argument of Wilmot J. in *The King* v. *Almon* he shows clearly that publications libelling the superior courts may be punished as contempts.'

By virtue of the decision in *Rex* v. *Clement* Mr. Justice Wilmot's doctrine that the issuing of attachments for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law,[2] became the law of the land, and it was confirmed and established by a line of succeeding cases extending down to the present century.

The defendant in *Rex* v. *Clement* applied to the Court of Exchequer for a rule *nisi* to discharge him from the fine after it was estreated, on the ground that the proceeding against him should have been by indictment and not summary. The Court, consisting of Richards C.B. and Graham, Wood, and Barrow BB., unanimously refused the application for the reasons given by the King's Bench in *Rex* v. *Clement* but cited no other authority. Wood B. says:

> It is incident to every superior court of justice to have power to fine and imprison for contempt. An offender may also be indicted, but it is not necessary to have recourse to so circuitous a mode of proceeding when the summary authority is more convenient and effectual. This power is inherent in the superior courts of record *per legem terrae* and as much so as any of those which they exercise by virtue of their jurisdiction in enforcing judgements founded on cases determined by means of a jury. That at once disposes of the question which has been made of their jurisdiction (*Re Clement* (1822), 11 Price Exchcq., 68).

[1] See p. 27, *supra*.

[2] Wilmot's *Notes*, 254.

The following representative list comprises cases, beyond those already referred to, in which Wilmot's doctrine is applied or in which *Almon's Case* is cited with approval:

Rex v. *Davison* (1821), 4 Barn. & Ald., 329. *Almon's Case* cited at p. 337.

Powis v. *Hunter* (1833), 2 L.J. Ch. N.S., 31.

Rex v. *Faulkner* (1835), 2 Crompton M. & R.(Excheq.), 525. *Almon's Case* cited at p. 530.

Charlton's Case (1836), 2 Mylne & Craig, 316.

Miller v. *Knox* (1838), 4 Bing. N.C., 574. *Almon's Case* cited at pp. 587, 614.

Ex parte Van Sandau (1844), 1 Phillips, 445. *Almon's Case* cited at p. 454.

Ex parte Turner (1844), 3 Mont. D. & D.G., 523. *Almon's Case* cited at p. 543.

Crawford's Case (1849), 13 Q.B., 613. *Almon's Case* cited at pp. 627, 631.

Tichborne v. *Mostyn* (1867), L.R. 7 Eq., 55, *n.*

McDermott v. *The Judges of British Guiana* (1868), L.R. 2 P.C., 341.

Regina v. *Lefroy* (1873), L.R. 8 Q.B., 134. *Almon's Case* cited at p. 139.

Regina v. *Skipworth and De Castro* (1873), 12 Cox Criminal Cases, 371.

Ex parte Martin (1879), 4 Q.B.D., 212. *Almon's Case* cited at p. 215.

Surendranath Banerjea v. *Justices of Bengal* (1883), L.R. 10 Ind. App., 171.

Re Johnson (1887), 20 Q.B.D., 68. *Almon's Case* cited at pp. 72, 75.

Hunt v. *Clarke* (1889), 58 L.J. Q.B., 490.

O'Shea v. *O'Shea* (1890), 15 P.D., 59.

Re Bahama Islands, [1893] A.C. 138. *Almon's Case* cited by Sir Charles Russell, A.G., Sir John Rigby, S.G., and Sutton, in argument for the Secretary of State for the Colonies. Sitting as Lord Justice in 1897, Sir John Rigby said that in *Re Bahama Islands* the question of contempt was discussed in a more exhaustive manner than

in any other case within his experience (*Seaward* v. *Paterson*, [1897] 1 Ch. 545, at p. 559).

Attorney General v. *Kissane* (1893), 32 L.R. Ir., 220. *Almon's Case* cited at pp. 271, 275.

Seaward v. *Paterson*, [1897] 1 Ch., 545.

McLeod v. *St. Aubyn*, [1899] A.C., 549.

Regina v. *Gray*, [1900] 2 Q.B., 36. *Almon's Case* cited at p. 40.

Rex v. *Parke*, [1903] 2 K.B., 432.

Rex v. *Davies*, [1906] 1 K.B., 32. *Almon's Case* cited at p. 40.

Scott v. *Scott*, [1913] A.C., 417. *Rex* v. *Clement* (1821)[1] is cited at pp. 438, 453. In the Court of Appeal *Almon's Case* is cited at pp. 256, 291 (*Scott* v. *Scott*, [1912] P., 241).

Rex v. *Daily Mail*, [1921] 2 K.B., 733; cites at p. 751 Mr. Justice Wills's eulogy in *Rex* v. *Davies*[2] of the opinion of Wilmot J. in *Almon's Case*.

Rex v. *Vidal* (1922), *Times*, Oct. 14.

Rex v. *Evening Standard* (1924), 40 *Times* L.R., 833.

Rex v. *Freeman* (1925), *Times*, Nov. 18.

In the case of *Regina* v. *Skipworth and De Castro* (1873), included in the above list, the defendant De Castro (otherwise Arthur Orton) had claimed the Tichborne estates in an ejectment action in which he was non-suited. He was afterwards committed for trial upon a charge of perjury in the course of the action. Skipworth and De Castro held meetings to excite sympathy for De Castro and to collect funds for his defence. At one of these meetings they both spoke, impugning the honesty and impartiality of the Chief Justice who was to preside at the trial for perjury. A rule *nisi* that the defendants should be committed for contempt was argued before the Court of King's Bench, and the following conversation took place between Mr. Justice Blackburn and De Castro:

De Castro.—I am not aware that I have committed any contempt and if I have done so it was not my intention; but I submit that the charge ought to be tried by a jury. Before them I could prove what I have stated to be true.

[1] 4 Barn. & Ald., 218. [2] [1906] 1 K.B. at p. 41.

Blackburn J. intimated that in a proceeding for contempt the matter was tried by the Court.

De Castro.—Then you decide that you are to try it yourselves?

Blackburn J.—Such is the course.

De Castro.—But you see I am charged with contempt in complaining of the Lord Chief Justice and you are his colleagues. It is not fair that you should try it without a jury.

Blackburn J.—To use any argument upon that point would be without avail. It has long been settled that an attempt to interfere with the course of justice is a contempt of Court. It is too late to dispute that.

The points involved in *Regina* v. *Gray* (1900) in the above list appear to be identical in substance with those in *Almon's Case*, but the decision in *Regina* v. *Gray* goes a step further. In *Regina* v. *Gray* it was argued that because the trial to which the libel (consisting of a scurrilous attack on the Judge) related was at an end at the time of publication, the course of justice could not be obstructed and therefore there was no contempt; but this contention was overruled. The Court pointed out that the newspaper article which constituted the libel was published in a town in which the Judge in question was still sitting under the Queen's commission as a Judge of Assize, and the judgement proceeds (p. 40): 'Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority is a contempt of Court.' Of the libel the learned Judge says: 'It is not criticism. I repeat that it is personal scurrilous abuse of a Judge as a Judge.' In *Almon's Case* the point that the course of justice could not be obstructed because the proceedings to which the libel related were at an end, was not argued by counsel, so far as appears, or referred to in the written judgement.[1] Had this point been argued it might have influenced Mr. Justice Wilmot's opinion. But the point having been taken in *Regina* v. *Gray* and overruled, the decision in that case established the principle that a libel on a

[1] Lord Hardwicke notices the distinction in *Roach* v. *Garvan*, where he says: 'prejudicing mankind before a cause is heard' (see p. 102, *infra*).

Judge in his official capacity, unconnected with a pending proceeding, may be the subject of attachment for contempt because of the obstruction to justice generally. *Regina* v. *Gray* was followed by the King's Bench Division in *Rex* v. *Vidal* (1922),[1] where the defendant, a stranger, was attached and committed for four months for publishing a scurrilous attack on the Judge after the conclusion of the trial of a divorce case. That an act of this description may be contempt of Court, no one will deny; the question is whether in early days it would not have been punished only after conviction in the ordinary course of law.

Lord Campbell had no doubt about the existence of the summary jurisdiction set up by Mr. Justice Wilmot. Referring to *Almon's Case*, his Lordship describes Wilmot's doctrine as highly important and quotes from the undelivered judgement the passage in which it is said that the issuing of attachments for contempts out of court stands upon immemorial usage. Although Lord Campbell thinks that in the case of a libel on a Judge the preferable course is to proceed by information or indictment, he says, 'there can be no doubt as to the power to proceed by attachment in such a case'.[2] Another Lord Chancellor, Lord Selborne, tacitly accepts the doctrine when introducing the Contempts of Court Bill in 1883.[3]

In 1831, upon the impeachment of Judge Peck by the House of Representatives in the United States, the principle of *Almon's Case* was elaborately discussed. Judge Peck's case will be considered later in showing how Wilmot's doctrine has been received in the United States and its influence on the law of contempt in that country (see ch. ix, *infra*).

Thus, by a series of decisions, and by citation, Wilmot's doctrine has become part of the law of England, but the question remains whether there is any solid ground for the contention that it was the law by immemorial usage in the year 1765.

[1] *Times*, Oct. 14, 1922.
[2] *Lives of the Chief Justices*, ii, 297, 298.
[3] *Hansard*, 3rd series, vol. 276, 1707.

IV

SOME ARGUMENTS AGAINST MR. JUSTICE WILMOT'S DOCTRINE

IN the middle of the eighteenth century there existed a considerable body of opinion opposed to principles by which, as it was contended, the liberty of the subject had been encroached upon and the practice of the Star Chamber had been restored in the King's Bench. I would refer, first, to the pamphlet of 1764 containing the alleged libel on Lord Mansfield[1] and protesting against the prosecution of seditious libel by *ex officio* information. It is to be remarked that throughout this pamphlet no complaint is made of the punishment of libels on the court by attachment. If this had been a recognized form of procedure at the time, it can hardly be that the author in declaiming against informations would have omitted to cite the more drastic procedure by attachment.

In 1766, the authoress of a once popular history of England, who in our own day has been described as 'the ablest writer of the new radical school',[2] wrote: 'The constitution of this country has never been purged from the venom with which it was infected by the creation of the Star Chamber. Its infamous doctrine and servile discipline have in many instances been adopted in the courts of common law' (Catharine Macaulay, *History of England*, ii, 248, note).

In 1769 was published *An Inquiry into the doctrine lately propagated concerning attachments of Contempt, the alteration of records and the Court of Star Chamber, upon the principles of law and the constitution, particularly as they relate to prosecutions for libels*; by an English constitutional Crown Lawyer (John Rayner, Barrister). From the title, this work was evidently inspired by the

[1] See p. 6, *supra*.

[2] Lecky, *History of England*, iii, 206.

proceedings in *Almon's Case*, though it only contains a bare reference to that case, which is said to be *sub judice* (p. 37).[1] In his preface the author says he publishes the book 'with a design to inquire whether the administration of public justice hath not within the space of fifty years last past been arbitrary and illegal.' Fifty years carries us back to 1719, about which time, as we have seen (pp. 24 ff., *supra*), traces of an extension of the practice of attachment are to be found. In a discourse on attachment[2] the writer contends that the mere seller of contemptuous writings, though on judges or courts, is not liable to be proceeded against by the oppressive and arbitrary Star Chamber process called an attachment for contempt but may demand a trial by jury.

In 1765 the same writer published, under the *nom de plume* 'A Gentleman of the Inner Temple', a *Digest of the law concerning libels*, in which he sets out[3] the arguments for the defendant in *Almon's Case*. This work and the *Inquiry* of 1769 contain references to a number of cases of *ex officio* information for libel and attachment for contempt.

The Case of *William Bingley* has been referred to as giving rise to arguments against the application of the procedure by attachment (see p. 16, *supra*). Bingley was the publisher of the *North Briton*, No. 50 of which (May 28, 1768) accuses Lord Mansfield of having acted as counsel for the prosecution in relation to the Wilkes Case. In June 1768 Bingley was brought before the Court upon a writ of attachment and committed to Newgate and was bailed after ten weeks. In January 1769 he was again committed on refusing to enter into a recognizance to answer interrogatories, and he remained in the King's Bench prison, recalcitrant, until June 1770. On principle he should have remained there for the rest of his life or until he submitted, but this dilemma was avoided. Having come to the conclusion that Bingley

[1] Presumably this was written some years before the work was published.

[2] At the end of the *Inquiry* (p. 44).

[3] Pages 137–9.

had been sufficiently punished, the Attorney General himself applied to the Court for his discharge; an order was made accordingly, and Bingley was let out 'in the same contumacious state in which he had been put in—with all his sins about him, unanointed and unannealed'.[1] No further step was taken under Bingley's attachment, and the result of this case was to give a decided check to the procedure by attachment in regard to contempts out of court. Writing in 1793, Bingley says that for the last twenty-four years there has been no repetition of attachments for constructive contempts. It is to be observed that the immediate cause of Bingley's long imprisonment was his disobedience to the order of the Court, a form of contempt that was unquestionably a proper subject for attachment. But his sufferings were in fact brought about by the previous attachment for libel against which he made his protest by refusing to answer the interrogatories.[2]

In 1770 appeared *Another Letter to Mr. Almon in matter of Libel*, which, like the letter of 1764, is attributed to Lord Camden's influence.[3] The principal object of this pamphlet was to protest against the rule of law, laid down by the King's Bench, that on a prosecution for libel the question of criminality was one of law and was not to be left to the jury.

In a postscript the writer comments on attachments for contempt of court and his argument may be summarized as follows. Any disobedience to the process of the court is punishable by immediate commitment because no court can perform its duty without penal compulsion on a party offending. The attachment ought to go immediately, otherwise the justice of the kingdom would stand still. It flows from the nature of a court of justice and is essential to it. Attachment for constructive contempt is a jurisdiction so extraordinary that it clashes with the

[1] *Another Letter to Mr. Almon* (see *infra*), postscript, p. xxxi.

[2] *Ibid.* (1770), postscript, xxxi; *A Sketch of English Liberty*, by William Bingley (1793); *Ann. Reg.*, 1768–70; *North Briton*, Nos. 50, 51, 64.

[3] See p. 6, *n.*, *supra*.

whole system of our law. The supposing a man to be subject to attachment for a constructive contempt that does not impede legal proceedings is as foreign to the idea of the constitution as the supposition that a man can be bound to surety of the peace for anything before judgement but actual violence, that is, for any constructive breach of the peace. He who traduces, reflects upon, or calls in question the justness of any judgement, may be supposed to aim at diminishing the authority of the court or of the persons of its judges; but, not being immediate outrages or the use of force, either to subdue any individual or to withstand the execution of the law, they do not require instant suppression and may well wait for a trial by jury. To act on any other principle is an abuse of the power of attachment, which is permitted from nothing but absolute necessity. A weighty objection against the exercise of the power of attachment when justice can go on without it, is that the court libelled will be party, prosecutor, and judge. Under such circumstances the judicature cannot be impartial and indifferent, which is the first requisite in the exercise of criminal jurisdiction. No Judge has a right by the power of attachment to shut a man's mouth or to prevent his pen from censuring what he thinks erroneous in the distribution of public justice. With regard to compelling an alleged offender, attached for constructive contempt, to answer interrogatories, it is pointed out that by our laws no man can be bound to accuse himself. But if a constructive contemnor of the Court can be attached and forced to give surety for answering interrogatories or be committed in default to prison, and these interrogatories must tend to his conviction if answered affirmatively, the necessary conclusion is that a man can be bound to accuse himself although by law it is forbidden.

Whether this argument had the sanction of Lord Camden or not, it appears to be a clear and forcible statement of the case for the objecters to the summary process. It corresponds with the arguments referred to in the undelivered judgement in *Almon's Case*, though it

will be remembered that that pronouncement was not given to the public until more than twenty years after.

In Jacob's *Law Dictionary* (9th edition, Ruffhead and Morgan, 1772), under the title 'Attachment', is the following definition taken verbatim from Bacon's *Abridgement* (1st edition, 1736–56):[1]

> Attachment is a process that issues at the discretion of the judges of a court of record against a person for some contempt for which he is to be committed, and may be awarded by them upon a bare suggestion or on their own knowledge without any appeal, indictment or information; for though by the statute of *Magna Charta* none are to be imprisoned *sine judicio parium vel per legem terrae*, yet this summary method of proceeding being absolutely necessary to the furtherance and execution of justice, seems to have been long practised and is certainly now established as part of the law of the land.

The editors of the dictionary add:

> but we apprehend it must be for a contempt in the face of the court or in the cases after mentioned; and, if for a contempt in the face of the court, the commitment is by rule of court, not on process, unless the party escape out of court before he is secured.

The 'cases after mentioned' are contempts by officers of justice and disobedience to and abuse of the rules and process of the court and contempts of inferior courts. On the authority of Lilly's *Practical Register*,[2] the Dictionary includes amongst the exceptions 'For persuading jurors not to appear on a trial, attachment lies against the party obstructing the proceeding of the court'. Lilly's book is based on Style's *Practical Register*, where it appears (under 'Attachment') that the case in point was decided in 1650 and that the offender was one of the parties to the suit. The accused, being a party, the Court might claim to exercise control over him which would not apply to a stranger, but another reason for the decision may be found in the recent abolition of the Star Chamber. Style cites no authority earlier than 1650 for granting an attachment in such a case.

[1] Bacon's *Abridgement* was founded on materials compiled by Gilbert C.B., on whom Wilmot relies in *Almon's Case* (see Preface to the *Abridgement*).

[2] i, 121.

The manner in which the author of Bacon's *Abridgement* refers to the summary method as 'certainly now established' is hardly consistent with undoubted immemorial usage. The editors of the Dictionary impose a limitation which confines the issue of attachments to civil contempts, contempts by parties and officers of justice, and contempts in the face of the court when the offender escapes before he is secured; cases of contempt in the face of the court when the offender is immediately arrested being dealt with by rule of court and contempts by strangers out of court, in the ordinary course of law—that is after trial by a jury.

Style (under 'attachment') cites a case of Hilary Term 22 Charles I (1647) in the King's Bench as authority for the statement that 'Generally an attachment doth lie for any contempt done against the Court'. This and the case of the party who persuaded the jurors not to appear suggests that upon the abolition of the Star Chamber the King's Bench acted upon the principle afterwards laid down by Chief Justice Herbert, that the reason for abolishing the Star Chamber was because its authority had been and was then in the King's Bench, and consequently the dissolved Court was unnecessary.[1] The King's Bench carried the principle so far as to adopt the summary procedure of the Star Chamber in cases where, before the Act of 1640 which put an end to that Court, the trial in a common law court would have been in the ordinary course of law.

But for a time a distinction was drawn between the contempt of libelling the court and other contempts committed out of court. In the reign of Charles II the publisher of a libel upon the court was proceeded against by information,[2] and it was not until 1721 that attachment was first applied to an offence of that nature. Under the title 'Interrogatories', the editors of Jacob's Dictionary express a doubt whether that procedure is legal and constitutional in cases of criminal contempt and suggest that it would be more rational to proceed by indictment.

[1] See p. 89, *infra*.

[2] See p. 85, *infra*.

In 1785, Lord Erskine, then at the Bar, wrote an opinion laying down the principle that no crime can be considered a contempt of any particular court so as to be punishable by attachment unless the act which is the object of that punishment be in direct violation or obstruction of something previously done by the court which issues it, and which the party attached was bound by some antecedent proceeding of it to make the rule of his conduct. The opinion is quoted at length in *Howell's State Trials* (viii, 83). Lord Erskine, when Lord Chancellor, acted upon this principle in *Ex parte Jones* (1806).[1] Though basing his decision upon *Roach* v. *Garvan* and evidently unwilling to differ from the opinion of his great predecessor, his Lordship was not prepared to subscribe to the doctrine that constructive contempt is punishable by attachment.

Down to the passing of Fox's Libel Act in 1792,[2] the law, as laid down by the Court of King's Bench, was that on a criminal trial for libel, the question whether the paper was libellous was one for the Judge and not for the jury.[3] The Act provides that the whole matter in issue shall be left to the jury so that their duty was no longer confined, as before the Act, to the question of publication and the sense ascribed to the paper. Accordingly, the effect of the later decisions was to extend Wilmot's doctrine and prevent the defendant charged with libelling a Judge from claiming the right to have the whole matter submitted to a jury. The defendants in *Rex* v. *Clement* (1821)[4] and subsequent cases were worse off than Almon would have been if the judgement in his case had been effective; they were prevented by the rule of summary procedure from claiming a right which Almon could not have established, in any case.

In 1793, Francis Hargrave, advising on the summary committal of two persons by the Irish House of Lords for a libel on the House, remarked that if the House of Lords or Commons or any of the courts of Westminster Hall

[1] 13 Ves. 237. See p. 21, *supra*.
[2] 32 Geo. III, c. 60.
[3] *Rex* v. *Shipley* (1784), 4 Doug., 73.
[4] 4 Barn. & Ald., 218.

may convict offenders of constructive contempt without trial by jury, there is nothing but their own wisdom to prevent them from practising the tyranny which first disgraced and at length overwhelmed the Star Chamber.[1] In 1798, the same learned writer, referring to the committal of Perry, the proprietor of the *Morning Chronicle*, by the English House of Lords for libel, asks, to what purpose was it to destroy the Star Chamber if it was intended that the House of Lords should exercise the like arbitrary powers?[2]

In the debate on *Sir Francis Burdett's Case* in 1810[3] Sir Samuel Romilly argued that the commitment by the House of Commons for a libel reflecting on its past proceedings was unjustifiable,[4] and he considered that the same principle applied to a libel on a court of law.[5]

We have seen[6] that Wilmot's opinion was severely criticized by an Irish Judge in *Taaffe* v. *Downes* in 1813; its correctness was also questioned by Bosanquet and Littledale JJ. in *Miller* v. *Knox* (1838).[7] The former, a Judge of the Common Pleas, admits that the right of the courts to issue attachment is coeval with the common law, that it is founded on immemorial usage and is as much a part of the law of the land as trial by jury. 'But', adds the learned Judge, 'the question remains what are the particular cases in which the punishment by attachment for contempt has been sanctioned by immemorial usage? Where is there any evidence of such ancient usage as, according to Wilmot's language, is to be enforced as part of the law of the land as much as trial by jury?' (pp. 606–7).

These observations were in answer to a question put to the Judges by the House of Lords, whether a stranger can be attached for refusing assistance to Commissioners of Rebellion in the execution of their process. Bosanquet and Littledale JJ. answered in the negative. The latter

[1] Hargrave's *Juridical Arguments*, i, 16. [2] *Ibid.*, ii, 204.
[3] See p. 22, *supra*. [4] *Hansard*, 1st series, xvi, 478–87.
[5] *Memoirs of Sir S. Romilly*, ii, 317.
[6] Page 28, *supra*. [7] 4 Bing. N. C., 574.

says that it never could be supposed that the Court of Queen's Bench as the superior court of criminal law jurisdiction could have a power of calling up a person who was a total stranger to their proceedings to show cause why an attachment should not be granted against him as a punishment for a supposed offence (p. 618).

Judge Peck's Case in the United States, in 1831, in which the principle of *Almon's Case* received much adverse criticism, should also be referred to.[1]

The only other judicial challenge offered in this country to the doctrine of *Almon's Case* is in the form of a general protest against the punishment of constructive contempts by attachment. The challenge came, not from the judicial bench, but in the course of a debate in the House of Lords.

Upon the second reading of Lord Selborne's Contempts of Court Bill in 1883, Lord Fitzgerald spoke of

> a class of criminal contempts popularly known as 'constructive contempts' arising not in open court in the presence of the judge but outside the court, sometimes from speeches, but principally from the publication of newspaper articles in reference to a trial about to take place or actually going on. This constructive contempt depended entirely upon the inference that the party speaking, writing or publishing, intended in some way to interfere with and impede the administration of justice. His Lordship was not inclined to favour the doctrine of constructive contempt. He considered that the present course of proceeding was exceedingly objectionable. The party was called up summarily and the matter inquired into, the judge being at once judge of the law, of the fact, of the intention, of the sentence, and his decision was without any power of review. There could be no doubt that the doctrine had a tendency unduly to fetter the freedom of the press. He believed that such a practice as summary punishment for constructive contempt did not exist in any other country. Its effect was to enforce silence on the part of the press when the public interests required the fullest publicity and the closest criticism of what was going on. Constructive crime was in all cases contrary to the genius of the English law and in such cases it was usual to interpose a jury for the protection of the subject. The present system was uncertain, undefined, and depended upon capricious discretion (*Hansard*, 3rd series, vol. 277, 1611 ff.).[2]

[1] See ch. ix.

[2] The above account is abridged.

Lord Bramwell entirely concurred in the remarks of Lord Fitzgerald (*Ibid.*, 1615).

The protests of the House of Commons against the present state of the law of contempt of court and the unsuccessful attempts at legislation on the subject are mentioned above (see p. 3, *supra*).

The argument of the Tichborne claimant in 1873 against the summary form of procedure for the punishment of slandering the court, an argument no doubt prescribed by learned counsel, has also been referred to (see p. 31, *supra*).

The circumstances under which Mr. Justice Wilmot's doctrine came to be established as law and some of the arguments against it have now been reviewed. It remains to be determined by an appeal to history whether or not the doctrine is supported by immemorial usage. If it should prove that contempts out of court committed by strangers were before the seventeenth century punished by the common law courts, only upon conviction after trial in the ordinary course of law, it follows that the present practice in such cases, though established by a long line of decisions, is based on a misapprehension.

V

THE NATURE OF CONTEMPT OF COURT

THE following analysis embodies Lord Selborne's classification of contempts on introducing the Contempts of Court Bill in 1883 (*Hansard*, 3rd series, vol. 276, col. 1707):

1. Contempts of the court itself, not consisting in disobedience to its orders (1) by strangers, (2) by parties.

(*a*) in the face of the court; punishable by fine and imprisonment by all courts of record, inferior as well as superior;

(*b*) outside the court; punishable by fine and imprisonment by superior courts of record only.

2. Disobedience to the orders of the court; confined to parties; punishable by imprisonment and not by fine.

'Stranger' in this connexion may be defined as any person, not an officer of justice or a party to pending proceedings, who is guilty of an offence which obstructs or tends to obstruct the administration of justice. His offence is contempt of court of a criminal nature.

The Lord Chancellor's two principal classes may be taken to comprise criminal and civil contempts respectively.[1] With regard to the first class—'Contempts of the court itself, not consisting in disobedience to its orders'—a distinction has been drawn between contempts of this nature committed by strangers and by parties. For instance, comments on pending proceedings emanating from the parties or their solicitors are a more serious contempt than those coming from independent sources.[2]

On the other hand, participation in an act which is criminal in a stranger may under certain circumstances not be so in a party. Thus, if a defendant commits a

[1] Cf. *Long Wellesley's Case* (1831), 2 Russ. & My., 639, at p. 667.

[2] Halsbury, *Laws of England*, vii, 285.

breach of an injunction, the act may be merely a disobedience to the order of the court, punishable as a civil contempt; but a stranger who aids and abets in the breach of the injunction is guilty of criminal contempt.[1]

In speaking of the law as it stands to-day, Lord Selborne did not find it necessary to distinguish between contempts committed by strangers and parties on the one hand and those committed by officers of justice on the other. Of contempts by officers I shall have something to say when dealing with the subject of 'Amercement and Fine' (see pp. 156 ff., ch. viii, *infra*).

Lord Selborne distinguishes between contempts committed in the face of the court and those committed out of court, in that the latter are punishable by fine and imprisonment by superior courts of record only. It may be noted that inferior courts of record have power to amerce for contempts out of court upon presentment, that is in the ordinary course of law.[2]

Speaking of 'contempts of the court itself, not consisting in disobedience to its orders', Lord Selborne is reported to have said: 'The superior courts on the other hand had power to punish contempts of that class committed elsewhere as well as those committed in the face of the court. The punishment of those contempts of both kinds was by fine or imprisonment or both.'[3] Whether there was power at common law to inflict the double penalty of fine and imprisonment will be questioned hereafter in dealing with the subject of 'Amercement and Fine'.[4]

In early history we find the notion of 'Contempt of the King' in the Anglo-Saxon 'Oferhyrnes'.[5] 'Contempt of

[1] Halsbury, *Laws of England*, vii, 280, 292.

[2] *Griesley's Case* (1588), 8 Rep. 41 *a*; *Hall* v. *Turbett* (1591), Cro. Eliz. 241.

[3] *Hansard*, 3rd series, vol. 276, 1708.

[4] See pp. 137 ff., *infra*.

[5] See the following references in *Ancient Laws and Institutes* (Rec. Com., 8vo ed.): *Laws of Edward the Elder*, pp. 159, 163, 165; *Laws of Æthelstan*, pp. 209, 215, 223; *Laws of Cnut*, p. 393. See also Stubbs, *Constitutional History*, s. 72; *Select Charters*, ed. Davis, pp. 74, 75; Pollock and Maitland, *History of English Law*, i, 26, *n.*, ii, 515; and see 'overhear' in *Oxford Eng. Dict.*

justice' is referred to as an offence in the 'Laws' set forth in the first half of the twelfth century.[1] 'Contempt of the King's writs' is mentioned in the Laws of Henry I:[2] in the same laws we have the 'overseunessa', a pecuniary penalty for contempt or disregard of orders.[3] We do not find the term 'contempt of court' in the Norman *Consuetudines et Justicie* of A.D. 1091,[4] nor, it is believed, in the *Laws of Normandy* of the twelfth century.[5] The Normans may have adopted the term from English law, for in Normandy under the French Kings in the thirteenth century we find '*contemptus curiae*' spoken of, and something similar under the name of '*contemptus justitiae*'.[6] In England, before the end of the twelfth century 'contempt of court' is a recognized expression and is applied to defaults and wrongful acts of suitors.[7] The default of an officer of justice is described by another writer of this period as 'contempt of the King's Majesty'.[8] The rules of procedure are strict and suitors are frequently amerced for default. 'The law is irritated by contumacy', say the authors of the *History of English Law*; 'instead of saying to the defaulter "I don't care whether you appear or no", it sets its will against his will—"But you shall appear".'[9] This rule of practice long survived in our law and in a Chancery suit, down to the year 1875, appearance might be compelled by attachment.[10] To-day it is considered that a defendant who fails to enter an appearance is not guilty of a punishable default—that the natural and the only consequence is judgement for the plaintiff. But for some defaults in procedure, coercion must still be the

[1] *Ancient Laws and Institutes: Laws of Edward the Confessor*, p. 444; *Laws of William the Conqueror*, pp. 485, 487; Stubbs, *Sel. Chart.*, 100; see also Pollock and Maitland, i, 101.

[2] *Ancient Laws and Institutes*, p. 523.

[3] *Ibid.*, p. 538.

[4] Haskins, *Norman Institutions*, Appendix D.

[5] Tardif, *Coutumiers de Normandie, Le tres ancien coutumier.*

[6] Tardif, *Summa de legibus Normannie in curia laicali*, 17, 235.

[7] Glanville, i, 33; iii, 6; xiii, 10.

[8] *Dialogue of the Exchequer*, bk. ii, c. 3.

[9] Pollock and Maitland, ii, 513, 595.

[10] Braithwaite, *Practice*, 161.

remedy.[1] Take, for instance, the case of a party who refuses to answer interrogatories. The principle to be applied in such a case was concisely expressed by Chief Justice McKean of the United States in the year 1778 and still holds good. Addressing the defaulting party, the learned Judge observes: 'Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.'[2]

In the thirteenth century Bracton lays down the principle which governs the punishment of contempt. He begins by stating his intention to show how suits and pleas are decided according to English laws and customs, that the erring may be taught and the contumacious may be punished; later, he says that there is no greater crime than contempt and disobedience, for all persons ought to be subject to the King as supreme, and to his officers.[3]

Magna Carta contains no reference to 'contempt' under that name, and the earliest mention of the word in the statutes seems to be in the Statute of Labourers (25 Edw. III, stat. 2, c. 5), which provides that offenders shall be attached by their bodies to be before the justices to answer for contempt in failing to obey the statute, so that they may make fine or ransom to the King in case they be convicted, and otherwise that they be ordered to prison, there to remain until they have found surety to comply with the statute. Attachment is the process by which they are brought up for trial.

By 25 Edward III, stat. 6, c. 6, it is provided that the temporalities of Bishops shall not be seized for contempt adjudged upon the writ *quare non admisit*.

Many later statutes refer to specific offences as contempts and provide for their punishment.[4]

[1] Halsbury, *Laws of England*, vii, 297 ff.

[2] *Respublica* v. *Oswald*, 1 Dallas (Pennsylvania), 319.

[3] *De legibus*, fos. 1 *b*, 127 *b*.

[4] See e.g. Statutes of the Realm: 27 Edw. III, stat. i, ch. 1; *ibid.*, stat. ii, c. 20; 4 Hen. V, stat. ii, c. 8; 23 Hen. VI, c. 1; 31 Hen. VI, c. 2; 12 Edw. IV, c. 4; 11 Hen. VII, c. 3; 21 Hen. VIII, c. 1; 22 Hen. VIII, c. 15; 25 Hen. VIII, c. 10; *ibid.*, c. 22, s. 9; 27 Hen. VIII,

Early instances of contempt are recorded in the *Placitorum abbreviatio* and the *Rotuli Parliamentorum* of the Record Commissioners. The *Registrum Brevium* contains at least thirty-two forms of writ dating from the reign of Edward III or earlier, in which contempt is alleged. The writ contains a statement that the defendant has been guilty of contempt of the King and his commands, e.g. *in nostri ac mandatorum nostrorum predictorum contemptum manifestum* (*Reg. Brev. Orig.*, fo. 78). These writs always express the particular act which constitutes the alleged contempt.[1] The writ of attachment now in use which mentions contempt generally without describing the specific act of contempt is of much later date (see p. 67, *infra*).

Fleta mentions several acts and defaults by which parties and officers of the law may bring themselves into contempt.[2]

Britton specifies several instances of contempt, but neither he nor Fleta suggests that contempts committed by strangers are punishable otherwise than in the ordinary course of law. For instance, Britton includes amongst offences punishable in the Eyre 'various wrongs' and specifies (*inter alia*) the following: 'Concerning those also who have tortiously disturbed judgement of our court, so that execution thereof cannot be made, or have knowingly broken the sequestration of our officers; and let such be punished by imprisonment or fine.[3] Each contempt of this description was presented in the Eyre

c. 20; *ibid.*, c. 24, s. 9; 33 Hen. VIII, c. 10, s. 7; *ibid.*, c. 22, s. 15; *ibid.*, c. 39, ss. 8, 37, 39, 42, 48, 49; 1 Mary, sess. ii, c. 9, s. 6; 2 & 3 Ph. & M., c. 2, s. 8; 23 Eliz., c. 3, s. 6; 35 Eliz., c. 2, s. 6; 3 Jac. I, c. 27, s. 9; 7 Jac. I, c. 24, s. 8; 12 Car. II, c. 23, s. 18; 14 Car. II, c. 21, s. 5.

[1] *Reg. Brev.* (1687); see both indexes, under 'attachment'.

[2] Fleta I, xx, 56; II, lii, 36; lxv, 6, 8, 10, 13; lxvi, 21, 24; lxvii, 4, 18; VI, vii, 7; xiv, 1, 19.

[3] Bk. I, ch. xxi, s. 7. Some of the MSS. have 'and fine' (*par prisoune* $\frac{ou}{e}$ *par fins*). It is suggested on the strength of the evidence in ch. viii *infra*, that if the correct reading is 'and', that word must be understood to be disjunctive. The statute 52 Henry III, c. 3, provides that offenders of this description shall be punished by ransom (*redemptionem*). By paying the amount fixed they will avoid imprisonment.

like any other trespass and the further proceedings were in the ordinary course of law. There is no suggestion of a summary procedure.[1]

With regard to the various kinds of contempt which the Court may be required to adjudicate upon at the present day and the method of trial and punishment, reference should be made to Halsbury's *Laws of England*, vol. vii, p. 280 ff. See the same volume at p. 282 with regard to the prerogative right of the Crown to pardon criminal contempt.

In early days contempt of the superior courts of a criminal nature was sometimes, perhaps in most cases, punished by the Council. (See Appendix, Cases (11), (14), (22), (29), (45), (55), (56), (62), (70).)

That every contempt of court is indirectly a contempt of the King, who originally himself sat in the Aula Regis, is clear from the form of the writ of attachment: 'touching a contempt which he, it is alleged, hath committed against us'.[2] But not every contempt of the King is now punishable as a contempt of court. Blackstone speaks of a number of misprisions and contempts affecting the King and Government,[3] but so far as these are unconnected with the discipline of Courts of Justice, they are untouched by the law of contempt of court and are now for the most part punishable by statute.

Lord Selborne assumes that all contempts, whether in court or out of court, are punishable in the superior courts by summary process, for he tacitly accepts as established law the declaration of Mr. Justice Holroyd in *Rex* v. *Clement* (1821),[4] confirming Wilmot's doctrine. It is submitted here, that so far as this doctrine extends to the summary punishment of contempts out of court committed by strangers, it is founded on a misapprehension of the common law, that it is not supported by immemorial usage—that down to the seventeenth century

[1] See *Benet's Case*, Eyre of Kent, 6 & 7 Edward II (24 Seld. Soc. 185). See also *Britton*, ed. Nichols, I, xxi, 10; xxii, xxvii, 10; II, xxxii, 9; III, x, 9; IV, i, 4; VI, iv, 8.

[2] Rules of the Supreme Court 1883, App. H, Form 12.

[3] *Blackst. Com.*, iv, 119.

[4] See p. 28, *supra*.

the common law courts never punished such contempts otherwise than upon confession or after conviction by a jury, and that libels on the Court were not punished summarily before the year 1721.

With reference to the punishment of contempts committed in the face of the Court, the late Mr. Solly-Flood Q.C., who had made an elaborate study of the records,[1] found numerous instances of such contempts dealt with according to the course of the common law by impanelling a jury *instanter*, and he came to the conclusion that the punishment by summary process of contempt committed by a stranger *in facie* was not resorted to till long after the death of Henry IV. The earlier committals for contempt *in facie* are, he says, *ad respondendum*.[2]

It is true that in many cases contempt *in facie* was tried by a jury. This was the mode of trial in the cases noted in the Appendix and numbered (34), (39), (68), (72), (74), (75), (77), (79), (80). Although these cases prove that some contempts *in facie* were punished in the ordinary course of law, they do not by themselves disprove the existence of the power to punish certain contempts of this nature summarily. I think that Solly-Flood's contention goes too far, and that where the contempt was committed in the actual view of the Court, the Court committed summarily; as Blackstone says, though not referring to contempt: 'the Judges of the Court upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it.'[3] Proof is supplied by the following authorities:

A.D. 1306. Parties being asked often by the Court by what right they claimed, would not answer; wherefore they were committed to the Fleet (*Year Book* (Rolls Series), 33–5 Edward I, 316).

[1] See Preface.

[2] Solly-Flood's letter in Elyot's *Boke named the Governour*, ed. Crofts, ii, 644. See also the same writer in *Transactions of the Royal Historical Society*, iii, N.S., 147–50.

[3] *Blackst. Com.*, iii, 331.

A. D. 1329. Defendant raised a clamour before Commissioners of Oyer and Terminer and was ordered to be committed (*Holbrooke's Case*, 3 Edward III, rot. 116, cited in *Earl of Thanet's Case* (1799), *Howell's St. Tr.* xxvii, 973).

A. D. 1343. Said by Shareshull J., that a Justice of *Nisi prius* may punish a trespass committed in his presence which sounds in contempt of the King and make process thereupon (*Cretynge's Case*, *Year Book* (Rolls Series), 17 Edward III, 276).

A. D. 1428. Stated in argument by Cotesmore (appointed the next year a Justice and afterwards Chief Justice of the Common Pleas) that if a juror refuses to be sworn the Court can assess a fine upon him or put him in prison at its election, and if the people at a session make great noise the Justices can order them to keep silence under a penalty (*Year Book*, 7 Henry VI, 12).

A. D. 1435. Said by the Court that when the Lord (of a manor or franchise) or Justice of the Peace orders a vagrant to prison, they can discharge him without writ because they can award him to prison upon suggestion, as the Chancellor or a Justice can award a man to the Fleet for rebellion in his presence (*Year Book*, 14 Henry VI, p. 8, pl. 34).

A. D. 1452. Fortescue C.J., when it was objected that a pleading was defective because it alleged that the defendant was in prison without saying he was lawfully in prison, held that the pleading was sufficient. He said the cause of imprisonment should be taken to be legal, 'for it may have been for some offence committed in Court (*at Court*) or any other suggestion made to us, of which we do not make any record, and so many are committed to custody in this place often times, the which shall rather be understood to be legal than otherwise' (*Year Book*, 31 Henry VI, p. 10, pl. 5).

A. D. 1557. Stanford J. in his *Pleas of the Crown* tells us that a prisoner is not bailable when the order for his committal is absolute, as where the Justice orders one to prison without showing the cause or for misdemeanour done before him (fo. 73 *b*).

A. D. 1558. Brooke C.J. in his *Abridgement* says that Justices of record can adjudge anything by their view, without trial by jury (title 'Trialles', 110, citing *Year Book*, 34 Henry VI, p. 45).

A. D. 1599. Per Anderson C.J.C.P.: 'A man may be imprisoned for a contempt done in court but not for a contempt done out of court' (*Dean's Case*, Cro. Eliz., 689).

A. D. 1628. Serjeant Ashley, arguing for the Crown in the debate in the Commons arising upon the *Five Knights Case*, and having referred to the apprehension of a felon by an officer without written warrant, adds: 'In like manner the judges in these several courts may commit

a man, either for contempt or misdemeanour without either process or warrant, other than "Take him, Sheriff" or "Take him, Marshal" or "Warden of the Fleet"' (*How. St. Tr.*, iii, 148).

A. D. 1629. Littleton, arguing for Selden, says: 'There can be no question made of it but that all contempts of what kind soever that are punishable by the laws of the realm are against the King and his government, immediately or mediately. And although the latitude of them be such that some may vastly exceed others, yet they are all as contempts, only trespasses, &c., punishable only by fine and imprisonment or by both, but not until conviction of the parties (as neither are other like offences), unless the contempt be in the face of the Court against which it is committed, which supplies a conviction' (*Selden's Case* (1629), *How. St. Tr.*, iii, 267).

A. D. 1690. In an argument which Sir Bartholomew Shower was to have delivered in *Rex* v. *Berchet*, he says: 'Besides, in all cases of contempts to a court, no presentment is necessary, no, not so much as to convict; for, if done *in facie curiae*, a record may be made of it and a punishment judicially inflicted, and that executed immediately' (1 Shower, K.B., 106, 110).

These authorities make it clear that from the reign of Edward I it was established that the Court had power to punish summarily contempt committed by a stranger in the actual view of the Court. From this it may be inferred that if the contempt were committed out of court, or not in the actual view of the Court, it was only punishable after trial in the ordinary course of law.

One other case which has been relied on to prove the summary power of the Court must be referred to because the question whether or not it is authentic has been the subject of much learned argument. This is the alleged committal of Prince Henry of Monmouth by Chief Justice Gascoigne, of which no record or authoritative report has been discovered. The truth of the story is assumed by Nathl. Bacon, who says of Henry V: 'He loved justice above the rank of his predecessors and in some respects above himself; for he advanced Gascoigne for doing justice, though to the King's own shame.' (*Discourse of the Laws and Government of England* (1672), pt. ii, p. 71.)

Lord Campbell argues at length for the truth of the story. (*Chief Justices*, i, 125 ff.)

Lord Mansfield embodies the pith of the story in the epitaph he composed to the memory of his colleague, Mr. Justice Denison:

> He lies here, near the Lord Chief Justice Gascoigne, who by a resolute and judicious exertion of his authority, supported law and government in a manner which has perpetuated his name and made him an example famous to posterity (Campbell, *Chief Justices*, i, 133).

Lord Selborne, C. accepts the story as authentic in *Watt* v. *Ligertwood*.[1] Foss takes the same view.[2]

J. H. Wylie[3] refers to the authorities and leaves the question of authenticity open.

The story is disbelieved by Bishop Stubbs,[4] the writers in the *Dictionary of National Biography* of the articles on 'Gascoigne' and 'Henry V', and Solly-Flood.[5] The last-named finds support for his opinion in the result of his searches through the rolls of the Court, which failed to discover any entry of the case. On this point, however, it must be observed that according to the judgement of Fortescue C.J. in 1452[6] a record was never made when an offender was imprisoned for an 'offence committed in Court', which must be taken to mean an offence punishable summarily and not in the ordinary course of law. If the absence of an entry in the roll is accounted for, a strong point in the argument against the credibility of the story is eliminated.

Whether the case of Prince Henry and Chief Justice Gascoigne is authentic or not, it is unnecessary to decide for the present purpose. If the account handed down is authentic it supports my contention that the summary procedure was applicable in such a case. The learned labours of Solly-Flood certainly prove that down to the reign of Henry V no case of contempt committed by a stranger out of court, or in the presence, but not in the

[1] L.R. 2 H.L.Sc., 367, *n.*
[2] *Biog. Jurid.*, 290, 291.
[3] *Hist. of England under Henry IV*, iv, 94–9.
[4] *Const. Hist.*, vol. iii, s. 322.
[5] *Trans. R. Hist. Soc.*, iii, N.S., pp. 147 ff. See also Elyot's *Boke named the Governour*, ed. Crofts, ii, 644.
[6] See p. 51, *supra*.

actual view, of the Court, has been found, in which the trial was not in the ordinary course of law.

'In the presence of the Court' (*in facie*) received a liberal interpretation. In 1365 one Brabson was assaulted on his way to the Court. His assailant was tried by a jury for the assault made 'in the presence of the Justices'.[1] In 1398 William de Laken came to London to prosecute his suit at common law, both in Parliament[2] and before the Council, against John de Hankeston and Robert de Kendale for extortion and oppression. John and Robert lay in wait for William, met him in Fleet Street, and killed him with a sword 'in the presence of the King and the whole Parliament'.[3] And see the cases numbered (72) and (79) in the Appendix.

The principle upon which the Court distinguished between contempt in court and contempt out of court was recognized in several cases in the first half of the eighteenth century, where the offence was contempt of an inferior court,[4] and Chief Justice Holt pointed out the distinction upon an application for a *Habeas Corpus* to discharge a person committed on a Speaker's warrant for breach of privilege by an act done out of the House.[5]

Numerous instances before the eighteenth century can be cited to show that contempts out of court committed by strangers, which in the nineteenth century might have been dealt with summarily, were proceeded upon in the ordinary course of law like other trespasses.[6] If it be said that this does not exclude the possibility that cases of summary procedure may be found, the answer is that none have been produced. But further evidence is forthcoming. If to the evidence contained in the Appendix

[1] See Appendix, Case (56).

[2] That is, 'in the King's Bench in Parliament' (*coram rege in parliamento*). See Baldwin, 310.

[3] Cal. Pat. Rolls, 22 Rich. II, 427.

[4] *Rex* v. *Langley* (1704), 2 Lord Raym., 1029; *Rex* v. *Revel* (1721), 1 Stra., 420; *Rex* v. *Univ. of Cambridge* (1723), 1 Stra., 557; *Rex* v. *Pocock* (1741), 2 Stra., 1157.

[5] *Rex* v. *Paty* (1704), 2 Lord Raym. at p. 1115.

[6] See Appendix, *passim*.

be added the fact that the late Mr. Solly-Flood searched through the records without discovering any cases of summary procedure where the contempt was out of court and committed by a stranger, the proof that no such summary procedure was ever practised will, it is submitted, be greatly strengthened.

Mr. Solly-Flood tells us that, for the purpose of his *History of the Writ of Habeas Corpus*,[1] he extracted from the records all the known cases of contempt in the King's Bench from the time of *Magna Carta* to the death of Henry V, and from the Year Books, all the reported cases on the same subject, and the result proves that not one of such cases was dealt with otherwise than according to the course of the common law, i. e. by action, information, presentment, or indictment. How much further Solly-Flood's examination of the records extended cannot be stated, but he certainly inspected those of Elizabeth's reign and the manuscript history proves that his pursuit of the subject was continued down to the nineteenth century. During the period over which this laborious search extends there were of course many cases of summary committal of officers for contempt and committal for contempt in the actual view of the Court. That Solly-Flood failed to find any trace of them may be accounted for by the fact that, as already shown, such cases were not recorded on the rolls (see p. 53).

[1] See Preface, *supra*.

VI

THE WRIT OF ATTACHMENT

MR. JUSTICE WILMOT says that he has searched without success for any traces of the introduction of attachment for contempts out of court but that it is as ancient as any other part of the common law.[1] Taken literally, the correctness of the latter statement cannot be questioned—the writ of attachment, as a preliminary process, does appear to go back beyond legal memory, though traces of its introduction are not beyond discovery. From the twelfth century the writ of attachment was the means of bringing a man before the Court for trial. In the thirteenth century the rule was that in cases of felony the defendant was to be brought up immediately by attachment of his body, whereby he was imprisoned, and this applied also to the more serious or criminal contempts. We shall see that the same procedure applied in the case of ordinary trespass against the King's peace, except that, there, attachment of the body only followed after previous attachments by pledge and distress had failed to secure the appearance of the accused. In purely civil cases the defendant was attached by pledges and, if he failed to appear, by distress. Attachment was merely the process by which he was brought up for trial in the ordinary course of law; trial and sentence or judgement followed. The connexion between attachment and *capias* will be referred to presently (see p. 60, *infra*).

It is clear, however, that when Wilmot speaks of 'the issuing of attachments' he means to include the subsequent procedure by which the defendant is convicted upon examination without a trial by jury. The real question is not whether 'the issuing of attachments' stands upon immemorial usage—no doubt it does; but whether

[1] Wilmot's *Notes*, 254.

attachment, followed by examination, instead of a trial in the ordinary course of law, stands upon that foundation. The learned Judge does not attempt to trace the origin of trial by examination, as distinguished from attachment, but treats attachment and examination as a form of procedure in cases of contempt which is as ancient as any other part of the common law.

In the present chapter it is proposed to discuss the writ of attachment, leaving examination, the second step of the process, to be considered next.

The word 'attach' in a legal sense is derived from the old French *attachier*, to lay hold of, and from this came the medieval Latin *attachiare* and *attachiamentum*. In its Latin form the word was in use in Normandy in the twelfth century. Du Cange cites a Charter of Liberties of the Normans of the year 1155 (ex *Cod. reg.* 4651).

> Liceat vicecomiti vel ballivo nostro atachiare et abreviare catalla defuncti. . . . Et si tales inveniantur in terra nostra in principio guerrae atachientur sine dampno corporum vel rerum (Du Cange, Supp., under 'Atachiare').

The same words are found in the Great Charter of 1215, Articles 26, 41.

The writ of attachment was introduced in England not later than the reign of Henry II. The direction to attach a man implied that he was to be attached by some tie to the control or jurisdiction of the Court, so that it should have a hold on him,[1] in other words, that he should give security for his appearance. The writ directed the Sheriff either to attach the party by gage or pledge[2] or by his body. In the latter case the body of the person attached was the security for his appearance and was effectual for the purpose, provided he did not escape. The writ was applicable to the case of a party who had been guilty of default or other contempt. The following instances quoted by Glanville (A. D. 1187) make this clear: Defaulting essoiner (I, 14, 21); defaulting party (I, 30), defaulting party attached by the body (I, 31); defaulting

[1] *Oxford Eng. Dict.* under 'attach'.

[2] As to which see Pollock and Maitland, ii, 185, *n.* 2.

demandant to be attached by the body 'on account of his contempt of court' (III, 6); defaulting defendant attached by pledges (VI, 10); breach of a concord (VIII, 5); pledges attached (X, 3); warrantor attached by pledges (X, 15, 16). Glanville quotes a writ to the Sheriff to capture an offender and keep him in safe custody and refers to it as a writ of attachment.[1] This is probably the earliest writ of the kind of which the form has been preserved.

For convenience of reference the following forms of writ are numbered. This is Glanville's writ of attachment by the body:

WRIT (1)

Rex vicecomiti salutem. Praecipio tibi quod sine dilatione diligenter quaeras per comitatum tuum A qui falso essoniavit B versus C in curia mea et salvo facias eum custodiri donec aliud inde habueris praeceptum meum. Teste, etc. (I, 14).

Glanville also gives a form of writ to attach by pledges:

WRIT (2)

Rex, &c. Praecipio tibi quod iuste sine dilatione attachiari facias per salvos et securos plegios N. quod sit coram me vel iusticiis meis ei die ad warrantizandum R. illam rem quam H. clamat adversus R. ut furtivam; et unde praedictus R. eum traxit ad warrantum in curia mea vel ad ostendendum quare warrantizare non debet. Et habeas, etc. (X. 16).

Glanville points out the procedure which applies in a purely civil matter, as distinguished from a matter involving a breach of the King's peace. As instances of the former class, he mentions the breach of a final concord made in the King's Court and novel disseisins. In such cases, if after three summonses the defendant fails to appear, the tenement is taken into the King's hand and there the process appears to stop.[2] If a breach of the King's peace is involved, and the defendant does not appear at the third summons, his body shall be taken (I. 31). A manuscript of Glanville's treatise, the date of

[1] Glanville, I, 14, 21.

[2] See 'Process of Imprisonment at Common Law', *L. Q. R.*, xxxix, 46.

which Maitland fixes at about 1265, contains the following gloss upon this passage :

Corpus enim capietur vel attachietur de consilio justiciariorum ut festinancius puniatur ille absens rettatus de pace domini regis infrincta propter curie contemptum (For his body shall be taken or he shall be attached, at the discretion of the justices, so that, having been accused in his absence of breach of the King's peace, he may be more quickly punished for the contempt of court). 'Glanville revised', *Harvard Law Rev.*, vi, 8.

The attachment here spoken of as an alternative to taking the defendant's body must be the attachment by gage and pledge. If the commentator is correct, the Court had a discretion, when the defendant had not appeared at the third summons, to imprison him or attach him by his goods.

In Henry II's Inquest of Sheriffs (A. D. 1170) Article 8 directs inquiry to be made concerning the forfeitures of the Forest, including the following :

And if the foresters or their bailiffs have taken any one or attached him (*attachiaverint*) by gage and pledge or accused him, and afterwards have released him themselves without an adjudication, those who have done these things are to be inquired of and scheduled (Stubbs, *Charters*, 177).

In Henry II's Assize of the Forest (A. D. 1184) the Foresters are directed, if they find a clerk committing an offence against the forest laws, to detain and attach him (*ad eos retinendum et attachiandum*) ; and whosoever shall offend against the Forest once shall be taken by safe pledges, and if he offend again, the like, and if he offend the third time no other pledge is to be taken than the body of the offender (Stubbs, *Charters*, 187, 188).

Henry III's Charter of the Forest (A. D. 1217) provides that the Foresters shall make attachments (*attachiamenta*) for pleas of the Forest and present them to the verderers, who are to present them for determination by the Chief Justice of the Forest.[1] By Article 10, if any one be taken (*captus*), i. e. attached by the body, and convicted of taking venison, he shall make grievous fine (*graviter*

[1] Articles 8, 16 ; Stubbs, *Charters*, 346–8.

redimatur) if he have wherewith, and if not he shall be imprisoned for a year and a day. Afterwards he shall be released if he can find pledges, but if not he shall abjure the realm.[1] In connexion with this charter, Coke, though in error in supposing it to have been granted by King John, says: 'it is to be observed that no man ought to be attached by his body for vert or venison unless he be taken with the manner[2] within the forest, otherwise the attachment must be by his goods' (4 Inst. 289).

Bracton (A. D. 1258) quotes both forms of writ which by this time have somewhat expanded:

Writ (3)

Rex vicecomiti salutem. Si A fecerit te securum de clamore suo prosequendo, tunc attachiari facias B per corpus suum quod sit coram iusticiariis nostris ad primam assisam cum in partes illas venerint responsurus eidem A de morte C (patris, matris, fratris vel sororis, vel alterius parentis vel domini sui) unde eum appellat. Et habeas ibi hoc breve. Teste, etc.

Writ (4)

Rex vicecomiti salutem. Si A fecerit te securum, &c. tunc pone per vadium et salvos plegios B quod sit coram iusticiariis nostris ad primam assisam, etc., responsurus eidem A de pace nostra infracta unde eum appellat. Et habeas ibi nomina plegiorum et hoc breve. Teste, etc. (Bracton, *De legibus*, fo. 149).

It will be observed that Writ (3) applies to an appeal of homicide and that the accused is to be attached by the body; that (4) applies to a simple breach of the King's peace, and the accused is to be attached by gage and pledge. In the latter case, if the accused fails to appear, he will, as we have seen, be liable to be attached by the body. Writ (4) is also applicable in a civil action where no breach of the peace is alleged. The Writ of *capias* differed from the writ of attachment in this, that *capias* was either mesne or final process, whereas attachment was always mesne process; attachment was either by the body

[1] Stubbs, *Charters*, 346, 347.

[2] See 'Mainour' in *Oxford Eng. Dict.*, and Pollock and Maitland, ii, 495, *n.*, 580.

or the goods, whereas *capias* was always by the body. But that there was a close connexion between the writ of attachment by the body and the writ of *capias ad respondendum* can be clearly proved. We have seen from Bracton that attachment by the body applied to a man who was appealed of homicide. Bracton also gives a writ to attach persons (unnamed) whom an approver has appealed of felony:

Writ (5)

Rex vicecomiti salutem. Praecipimus tibi quod si aliquem habes latronem probatorem in balliva tua, qui publice confessus fuit latrocinium vel aliam feloniam coram serviente nostro vel ballivo vel aliis probis hominibus et aliquos de societate appellaverit de latrocinio, roberia, morte hominis vel alia felonia, tunc ipsos sine aliqua dilatione attachiari facias secundum consuetudinem regni nostri ad habendum eos coram nobis vel capitali iustitiario nostro ad summonitionem nostram vel ipsius capitalis iustitiarii nostri. Teste, etc. (*De legibus*, fo. 152 *b*).

Another writ follows which Bracton describes as concerning 'the taking (*capiendo*)' of the persons accused by the approver and producing them before the Justices:

Writ (6)

Rex vicecomiti salutem. Praecipimus tibi quod sine dilatione capias A quem B (qui se cognoscit esse latronem) in curia nostra coram iustitiariis, &c. appellat de societate et latrocinio . . . et illum captum quod citius poteris ducere vel venire facias coram eisdem iustitiariis nostris apud talem locum ad respondendum eidem B, etc. (*De legibus*, fo. 152 *b*).

Here we have a *capias ad respondendum* of Bracton's time. If this criminal process be compared with the *capias ad respondendum* in the *Registrum Brevium* which survived as a civil process down to modern times, it will be seen that they correspond very nearly.

The *capias* in the Register runs as follows:

Writ (7)

Rex vicecomiti salutem. Praecipimus tibi quod capias A si inventus, &c. et eum salvo custodias ita quod habeas corpus eius coram iusticiariis nostris apud West. tali die ad respondendum B de placito, &c. Et unde tu ipse mandasti iusticiariis nostris apud West., etc., quod praedictus A nihil habet in balliva tua per quod potest attachiari, etc. (*Reg. Brev.* (*Jud.*), 1).

This is almost identical with the modern form given in *Blackstone's Commentaries* (vol. iii, App., p. xvi).

If we compare Bracton's *capias ad respondendum* (Writ 6) with his writ of attachment of the body (Writ 3), we shall see that the objects of both are similar. One directs the Sheriff to cause the defendant to be attached by his body that he may be before the Justices at the first assize to answer the appellant; by the other the Sheriff is to take the defendant and bring him as soon as possible or cause him to come before the Justices at such a place, to answer the appellant. Imprisonment follows in both cases. The only distinction in principle seems to be that in one case the defendant is at large and is to be 'attached', and in the other he is already attached and is to be 'taken'. Perhaps we get here a clue to the origin of the *capias*. It will be observed that in Bracton's general writ to attach the unnamed persons whom the approver has appealed, it is merely 'to attach' and not 'to attach by the body'. The Sheriff having discovered the suspected persons will take pledges for their appearance. Then one of them, A by name, is to be brought to trial. He is already attached and so instead of attaching him by the body, which would be an attachment upon an attachment and might be considered a stultification of the previous act of the Court, he is brought by another process, viz. a *capias*. You do not 'attach' him when he is already attached, but you 'take' him. It seems probable that Bracton's *capias* (Writ 6) was an early instance of that writ, and that from its use in a case of felony it came to be used later in civil cases as a substitute for the writ of attachment of the body. For most purposes attachment of the body became merged in the *capias*. The Statute of Marlborough (A. D. 1267), c. 23, provides that if bailiffs accountable withdraw themselves and have no lands, they shall be attached by their bodies (*per eorum corpora attachientur*). By the Statute of Westminster II (A. D. 1285), c. 11, it is ordained that if bailiffs, &c., are found to be in arrear their bodies shall be arrested (*arrestentur corpora ipsorum*). A writ in the Register reciting this statute

speaks of bailiffs being 'arrested by their bodies (*per eorum corpora arrestentur*)'.[1] Britton says that if the Sheriff return that the trespassers have nothing in his bailiwick whereby they may be attached, it shall be awarded that he take their bodies (*preyne les cors*); where the solemn form of attachment is not required, the attachment shall be made by the bodies forthwith (*tauntost soint les attachementz fetz par les cors*).[2] By 25 Edward III, statute 5, c. 17, such process shall be made in an action of debt or detinue by writ of *capias* as is used in a writ of account. It is provided by the same statute (c. 14) that if a man be indicted of felony, the Sheriff shall be commanded to attach his body by writ or precept which is called a *capias* (*d'attacher son cors par brief ou precept qu'est appelle* capias).

A Peer who was defendant in an action for rescue could not claim privilege from arrest. Brooke says that generally *capias* lies not against a Lord, for he is understood to have sufficient to be distrained on, but for contempt *capias* lies (*Bro. Abr.* 'Exigent & capias', 55).

Apparently 'attach A by the body', 'arrest the body of A', 'arrest A by the body', and 'take A' are understood to mean the same thing. The original idea of attachment was to compel a man to appear by taking some security from him instead of keeping him in prison until his trial. When it came to attaching him by his body it meant 'taking' him into custody and nothing else.

That the writ of attachment was an interlocutory proceeding has already been shown by reference to the 39th chapter of the Statute of Westminster II.[3] The following is a form of writ of attachment *ad respondendum* for a specific act of contempt, taken from the Year Books (Rolls Series, 33–35 Edward I, 37):

WRIT (8)

Rex Vicecomiti Norfolciensi salutem. Si Rogerus de Honeworth fecerit te, &c. tunc pone, etc., Rogerum Blesard quod sit coram, etc., ubicunque, &c. ad respondendum, tam nobis quam praefato Rogero de Honeworth, quare quoddam breve nostrum, per finem XL *s.* pro brevi

[1] *Reg. Brev.* (*orig.*), fo. 137.
[2] Britton, I, xxvii, 5, 11.
[3] See p. 13, *supra*.

illo ad opus nostrum capiendam, nomine praedicti Rogeri de Honeworth et Aliciae quondam uxoris eius hoc penitus ignorantium, fraudulenter et maliciose impetravit in decepcionem curia nostrae et grave dampnum ipsius R. de Honeworth. Et habeas, etc.

It is clear from the words 'tam nobis quam praefato R. de H.' that the proceeding was a *qui tam* action by bill to answer to the King for the contempt and to the party injured in damages. This is the form of action spoken of by Chief Justice Hale in his *Discourse concerning the Courts of King's Bench and Common Pleas.*[1]

Notwithstanding the distinctions which have been drawn between 'attachment' and 'arrest' (see, e. g. Cowel's *Interpreter* under 'Attache'), it may be suggested that attachment by the body was merely a form of process for effecting arrest. Bracton seems to treat it so in the very last passage of his Treatise, where he says that in capital cases it does not follow that there is any attachment, because the man may be arrested by any of the King's subjects without any precept.[2] In course of time 'attachment by the body' was confined to cases of contempt, and for that purpose alone it exists at the present day.[3] The words 'by the body' are now omitted from the writ because the attachment by gage and pledge has ceased to exist. In actions between subject and subject arrest on mesne process under a writ of *capias* was in use until it was abolished by section 6 of the Debtor's Act, 1869; it still survives in certain proceedings by the Crown.[4]

Attachment is sometimes synonymous with distress. The 27th chapter of Britton's first book is headed 'De attachementz' and indicates the procedure on a writ of trespass against the King's peace. The Sheriff is to cause the trespasser to be distrained by his cattle or by his chattels and adjourn him to be in court at the day fixed by the writ to answer for the trespass alleged. It

[1] See p. 66, *infra.*

[2] *De legibus*, fo. 444. The translation of the passage in the Rolls Series is open to question.

[3] Rules of the Supreme Court, 1883, App. H, Form 12.

[4] See G. S. Robertson, *Law and Practice of Civil Proceedings by and against the Crown.*

is gathered that the attachment by gage and pledge is here referred to. If the defendant makes default, a more stringent form known as the great distress is awarded and another day is fixed for him to appear. If he again makes default, the issues are forfeited and the distresses are continued from day to day until he appears. If the Sheriff returns that the defendant has nothing whereby he may be attached, it is awarded that he take the defendant's body, and if his body is not found he is outlawed. In an attachment of felony no distress runs except against the body if it can be found (Britton, Bk. I, ch. xxvii, ss. 1, 3, 5).

In the case of simple trespass against the King's peace, it appears that the defendant is not attached by the body as long as he has any property which the Sheriff can lay hold of; it is only when the Sheriff returns that the defendant has nothing, that a writ issues to attach him by the body. In the case of trespass against the King or his consort or his children or against foreign persons, as ambassadors or alien friends, or against the King's officers or against those who have taken the cross, the solemn form of attachment is not required, but the bodies of the defendants are to be immediately attached so that the Sheriff may have them to answer on the first day.[1] Trespass against the King and trespass against his officers involve what is now known as criminal contempt, and in such cases the defendant is to be brought to the court by immediate attachment of the body without the earlier process.

In Britton, therefore, we find the practice in cases of contempt laid down. Contempt of court is a trespass and the defendant is brought up by attachment of his body to take his trial as he would take it in the case of any other trespass. He is not tried by a summary procedure as Mr. Justice Wilmot supposes. Attachment is the mesne process by which he is brought up to be tried in the ordinary course of law. Trial by examination, of which attachment is in later times the preliminary step,

[1] Britton, I, xxvii, 11.

has no existence in Britton's day and therefore is not coeval with the common law.

To sum up the several processes as they stood at the end of the thirteenth century, we find :

(1) In personal actions, not involving breach of the peace and excluding some others:[1] (*a*) summons, (*b*) attachment by gage and pledge, (*c*) distress. Attachment of the body (*capias*) was made applicable to actions against bailiffs, &c., for account, by the Statute of Marlborough (1267), c. 23, and the Statute of Westminster II (1285), c. 11.

(2) In personal actions, involving breach of the peace and some others:[2] (*a*) attachment by gage and pledge, (*b*) distress, (*c*) attachment by the body (*capias*).

(3) In criminal contempt, attachment by the body, only.

(4) In felony, the same.

Hale, in his *Discourse concerning the Courts of King's Bench and Common Pleas*,[3] refers to suits by bill in the King's Bench which were anciently practised by that Court but had been long disused. He says that these suits were for the most part for contempts, deceits, and trespasses upon the case, &c., and quotes instances in the reign of Edward III. One of these is the case of a man attached by bill to answer to the King and a party for an assault committed on the plaintiff when he came to prosecute a suit in the King's Bench.[4] The bill was of the nature of a *qui tam* information in which the plaintiff sued on his own behalf for damages and on behalf of the King for a penalty. Having filed his bill, he had the like process as if the suit had been by original; viz. if in trespass, attachment by pledges and *capias*;[5] if in action upon the case, where no process by *capias* lay till 19 Henry VII,

[1] See Pollock and Maitland, ii, 519. [2] *Ibid.*

[3] *Hargrave's Tracts*, 363.

[4] *Y. B.*, *Lib. Ass.*, 30 Edward III, 14.

[5] According to Britton and Fleta the process in their time was (1) attachment by gage and pledge, (2) distress, (3) *capias* (see *supra*).

c. 9, then by attachment by pledges and distress until the passing of that statute. This shows that in the fourteenth century there was an established procedure for the punishment of contempts like any other trespasses in the King's Bench, viz. by bill and writ of attachment to bring the defendant to trial by a jury in the ordinary course of law. Upon a verdict of guilty the judgement was that the defendant be taken to satisfy the King for his fine and the subject for his damages, and he was discharged upon finding pledges for the payment.

An ordinance of Edward II[1] provides that the Justices shall punish certain misdemeanours, including the forcible obstruction of jurors, by imprisonment and fine, and justice is to be done in such cases by bill as well as by writ original. These words exclude the notion of procedure otherwise than in the ordinary course of law.

We do not find in the *Registrum Brevium* (ed. 1687) a writ of attachment for contempt simply, without specifying the actual offence, applicable in the courts of common law, but in the Appendix to that work (p. 45) there is such a writ to compel attendance before the Court of Chancery of one who is alleged to have committed contempt, in the following form:

WRIT (9)

Rex, etc. Vicecomiti Cancii salutem. Tibi praecipimus quod attachies A.B. ita quod eum habeas coram nobis in Curia Cancellariae nostrae in quindena Paschae, etc., ubicunque tunc fuerimus ad respondendum nobis tam de quodam contemptu per praefatum A.B. nobis illato ut dicitur quam de hiis quae sibi tunc et ibidem obiicientur. Et ad faciendum ulterius et recipiendum quod dicta curia nostra consideraverit in hac parte. Et hoc, etc. Teste, etc.

The earliest form of writ of attachment for contempt, without specifying the actual offence, applicable in the common law courts, so far as I have been able to discover, is in the *Thesaurus Brevium* (2nd ed., 1687, p. 4). This writ, of which a copy is subjoined, is not found in the first edition of the book, issued in 1661.

[1] *Rot. Parl.*, i, 371 *b*.

Writ (10)

Carolus Secundus Dei gratia Anglie, Scotie, Francie et Hibernie Rex, Fidei Defensor, etc. Vicecomitibus Londinensibus salutem. Precipimus vobis quod attachietis A.B. si inventus fuerit in ballia vestra. Et eum salvo custodiatis ita quod habeatis corpus eius coram nobis apud Westmonasterium die Mercurii proximo post quindenos Pasche ad respondendum nobis de quibusdam transgressionibus et contemptibus in curia nostra coram nobis illatis. Et habeas (*sic*) ibi tunc hoc breve. Teste, etc.

A form very nearly corresponding to Writ (9), in English, was in use in the Court of Chancery down to the commencement of the Judicature Acts.[1] Writ (10) differs very little from Writ (9), and we should gather from the King's name that (10) was adapted from the Chancery form for use in the King's Bench in connexion with the Act 13 Charles II, st. 2, c. 2, s. 4.

The writ of attachment prescribed by the Judicature Acts is as follows :

Writ (11)

Victoria, &c., to the Sheriff of, &c., greeting. We command you to attach C.D. so as to have him before us in the —— Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us as well touching a contempt which he it is alleged hath committed against us as also such other matters as shall be then and there laid to his charge. And further to perform and abide such order as our said Court shall make in this behalf. And hereof fail not and bring this writ with you. Witness, &c.

This is almost the same as the Chancery form quoted from the Register (Writ 9). The clause which requires the defendant to answer to 'other matters', not specified, which are to be laid to his charge on the return of the writ, proves the sisterly relationship between the Court of Chancery and the Star Chamber. The following is the Star Chamber form :

Writ (12)

Iacobus Dei gratia, etc., vicecomiti Midd. salutem. Praecipimus tibi quod attachias H.L. ita quod eum habeas coram nobis et concilio nostro apud Westmonasterium in octavis sancti Michaelis proxime futuris ad

[1] Braithwaite, *Record and Writ Practice*, 158.

respondendum nobis et dicto consilio nostro tam de quodam contemptu nobis per praefatum A[1] illato (ut dicitur) quam de aliis sibi tunc obiicientur et ad faciendum ulterius et recipiendum quod per nos et dictum consilium nostrum consideratum fuerit in hac parte. Et hoc nullatenus omittas; et habeas ibi hoc breve. Teste, meipso, etc. (Hudson's *Treatise on the Star Chamber, Collectanea Juridica*, ii, 147).

The form under the Judicature Acts now in use does not fix a date for the return of the writ, a modification introduced by those Acts. The question of 'guilty' or 'not guilty' of the contempt alleged is decided upon the application for leave to issue the writ, so that if the judgement is 'guilty' the Court directs the issue of a writ requiring the offender to answer touching a contempt alleged against him, but in respect of which, in fact, he has already been convicted and sentenced.[2]

In early days, as we shall see,[3] contempt which did not actually or notionally involve a breach of the peace or other criminal offence, was punished by amercement and attachment did not apply. The writ of attachment now in use applies to all kinds of contempt. In some cases committal or sequestration is applicable instead of attachment.[4]

[1] *Sic.* This should be 'H.L.'

[2] Some observations on this and other points arising in practice in connexion with contempt of court will be found in *L. Q. R.*, xxxvi, 394; xxxviii, 185.

[3] See Chap. VIII, *infra.*

[4] See Halsbury, *Laws of England*, vii, 307 ff.

VII

TRIAL BY EXAMINATION

THE advantage of interrogatories for the examination on oath of parties to civil proceedings has been proved in modern practice. The plaintiff and defendant are thereby enabled to see clearly the issues on which they differ and to avoid the expense of adducing at the trial evidence of facts which are not in dispute. But where personal liberty is concerned, a deep-rooted feeling has always existed in this country against examining a person accused of a criminal offence, with the object of obtaining admissions by which he may convict himself. This practice of examination upon interrogatories, derived from the Ecclesiastical Courts, prevailed in the King's Council in the fourteenth century and was reproduced in the two courts of equity which were evolved from the Council—the Court of Chancery, a court of civil jurisdiction, and the Star Chamber, in which crimes less than capital were punished.[1]

The exercise of jurisdiction by both these courts was based on the supposition that the suitor could not obtain justice by the strict rule of the common law, and in both courts the trial was upon the written depositions on oath of the defendant and other witnesses. The Star Chamber punished contempts of the common law courts and the court contemned had a concurrent jurisdiction in such cases. The Court of Chancery claimed, in matters of procedure, a jurisdiction *secundum potestatem absolutam*, as contrasted with the *potestatem ordinatam* of the common law (Bro. Abr., 'Conscience', 26, citing Y.B. 9 Edw. IV, 14), and the Star Chamber claimed a similar privilege.

Examination upon interrogatories was unknown as part of the ordinary procedure in an action at law until the passing of the Common Law Procedure Act 1854. Before that date, if examination upon interrogatories was

[1] Lord Somers describes the Star Chamber as 'a spawn out of the Council' (Hardwicke, *Misc. State Papers*, ii, 473).

necessary, a bill of discovery was filed in the Court of Chancery by way of supplement to the action at law; and yet the Court of King's Bench, which disclaimed the power to order interrogatories in a civil action, had, from the seventeenth century, sanctioned the examination of a person charged with a criminal offence, the penalty for which was fine and imprisonment. Blackstone explains this anomaly by saying that the method of making the defendant answer upon oath to a criminal charge was derived to the Courts of King's Bench and Common Pleas through the medium of the courts of equity.[1] When the circumstances are considered under which the Star Chamber was abolished, it is clear that this was the court of equity from which the method of procedure was derived. The Star Chamber had taken upon itself to punish contempts of the common law courts, and when it ceased to exist, cases of that description were dealt with in the court in which they occurred. The question to be submitted is whether in taking over the jurisdiction previously exercised by the Star Chamber, the common law courts were justified in adopting the method of procedure followed in that court.

In the present chapter it is proposed to trace the history of trial by examination in cases of contempt of court, and evidence will be produced to show that the attempt to introduce this method in a common law court was first made in the reign of Elizabeth, but with so little success that in the year 1630 the Clerks could not find any instances in the records to enable them to say what had formerly been the proper fee on taking an examination. It is probable that the use of examination in cases of contempt in the common law courts was established in the seventeenth century and became more frequent after the abolition of the Star Chamber in 1641, but no case of the punishment by this method of a libel on the court by a stranger has been discovered before the year 1721.

On a trial for contempt by examination on oath, when that practice was established, the course of procedure

[1] *Blackst. Com.*, iv, 288.

was as follows. The defendant was brought into court by a writ of attachment, or by an order to show cause why attachment should not issue, and was allowed to enter into a recognizance to attend and answer interrogatories with regard to the alleged contempt. If he refused to enter into a recognizance he was committed to prison, and remained there until he submitted. This form of procedure is still in force (see the Crown Office Rules, 1906, rr. 240 ff.).

In the common law courts, if the defendant in his examination denied the contempt, he was acquitted, but he was liable to be prosecuted for perjury.[1] In the Court of Chancery witnesses might be called to contradict the defendant's evidence.[2]

According to a petition of the Commons in 3 Henry V, writs of *Subpoena* and *Quibusdam certis de causis* and examinations based upon the civil law and the law of Holy Church were first introduced by John de Waltham,[3] a secular priest who was Keeper of the Rolls from 1381 to 1386, and died in 1395. It seems more probable that de Waltham only adopted and promoted the use of these writs while he held the office of Keeper than that he invented them, as generally supposed. The earliest known writ of *Quibusdam* is dated in 1346 and the earliest *Subpoena* in 1364, and there is no evidence that de Waltham held any post in the Chancery before 1381.[4]

By the writ *Quibusdam* the defendant was given no warning of the charge to be made against him, and by the addition of a penal clause this became the writ of *Subpoena* which issued under the privy seal.[5] If the facts could not be otherwise ascertained, the parties were examined on oath[6]—in a criminal trial this meant that the defendant was asked to convict himself. Even

[1] *Blackst. Com.*, iv, 287.

[2] Tothill, *Transactions of the Court of Chancery* (1649), 33.

[3] *Rot. Parl.*, iv, 84 *a*.

[4] See Palgrave, *Essay on the King's Council*, 41; Baldwin, *The King's Council*, 288; Foss, *Biog. Jurid.*, sub nom.; *Dict. Nat. Biog.*, sub nom.; Holdsworth, *Hist. Eng. Law*, i, 485, *n.*

[5] Baldwin, 288–90.

[6] *Ibid.*, 296.

Hudson, a staunch upholder of the Star Chamber, shows how the practice of examination came to be abused:

But afterwards this advantage of examination was used like a Spanish Inquisition to rack men's consciences, nay, to perplex them with intricate questions, thereby to make contrarieties, which may easily happen to simple men; and men were examined upon one hundred interrogatories, nay, and examined of the whole course of their lives (*Collect. Jurid.*, ii, 169).

Speaking of the examination *ore tenus*, which was not on oath, but in private, Hudson points out that the Star Chamber could not adopt that course if the defendant denied the accusation, but only if he confessed.

Therein, sometimes (he says), there is a dangerous excess. For, whereas the delinquent confesseth the offence *suo modo*, the same is strained against him to his great disadvantage. Sometimes many circumstances are pressed and urged to aggravate the matters which are not confessed by the delinquent; which surely ought not to be urged, but what he did freely confess in the same manner. And happy were it if these might be restrained within their limits, for this course of proceeding is an exuberance of prerogative (*Collect. Jurid.*, ii, 127, 128).

Professor Baldwin has shown that the system of interrogatory examinations was practised by the Council in Edward II's reign and developed rapidly during the reign of Edward III, and he cites cases of the latter reign in 1360, 1365, and 1372.[1]

In the petition of 3 Henry V[2] the Commons allege that the Justices of both Benches are occupied with examinations when they should be attending to the regular business of their courts. Evidently the Justices were assisting in cases pending before the Council, and were thus becoming familiar with the process of examination upon oath as practised there.

In 1346 a clerk accused of forging a writ was brought before the King's Bench, sworn and examined secretly by the Justices.[3] It was probably common custom to

[1] Baldwin, *The King's Council*, 296, 297, citing *Cal. Close Rolls*, 34 Edw. III, 123; 39 Edw. III, 114 ff., 205; *Cal. Pat. Rolls*, 46 Edw. III (case of William Stiles).

[2] Page 72, *supra*.

[3] *Y. B.* (Rolls Series), 20 Edw. III, Part ii, Introduction, p. 50.

examine an officer charged with malpractice, but it is doubtful whether examination on oath had been in operation very long. It looks like an ecclesiastical innovation of the fourteenth century.[1]

The verbal interrogation of parties, not on oath, was no new thing in the fourteenth century, for it was made use of in the King's Court very early to obtain admissions which might dispose of the case.[2] Bracton recommends examination: 'Officium autem (iusticiarii) est diligenter causam examinare . . . Interrogare enim debet partes, tam actoris quam rei';[3] but Bracton is speaking of an assize of *novel disseisin*, not of a matter of crime.

One stage in a criminal trial provided a convenient opportunity for the verbal interrogation of the accused, namely, when he was called upon to plead to the charge upon arraignment. In many of the early cases of contempt it appears that the defendant confessed and prayed to make fine and no doubt he was encouraged to do so. It was probably explained to him that if he confessed before a jury was impanelled, his punishment would be lighter than would be the case if he were found guilty by verdict. If the defendant was questioned and damaging admissions were drawn from him and construed into a confession,[4] arraignment, which was intended to secure the regularity and justice of the trial, was converted into means of destroying his liberty.

Confession was of different degrees. In a case not capital a defendant might put himself upon the King's mercy and submit to a small fine without confessing himself guilty, the entry being *posuit se in gratiam regis*. In such a case the defendant was not estopped from pleading 'not guilty' to an action for the same fact, as he would have been if the entry were *quod cognovit indictamentum*.[5] Confession might be implied, as, for instance, where the Lord of a Leet and his Steward had taken

[1] See Baldwin, 296–8. As to the disciplinary jurisdiction over officers of justice, see pp. 156 ff., *infra*.

[2] Bracton, *Note-book*, case 303 (A.D. 1220), cited by Holdsworth, ii, 250.

[3] *De legibus*, fo. 183 *b*, cited by Holdsworth *ut supra*.

[4] See Baldwin, 227.

[5] Hawkins P.C., Bk. II, ch. 31, s. 3.

an indictment which was beyond their jurisdiction, the indictment was removed into the King's Bench and the Lord was attached by writ to make fine for encroaching on the royal jurisdiction. The Lord was convicted on his own return to the writ and he made fine with 40*s*. (*Year Book, Lib. Ass.*, 41 Edward III, pl. 30).

In *Royson's Case* (1629)[1] the King's Bench punished summarily by imprisonment and pillory, upon confession, the offence of perjury in giving bail, and the report says that the confession was recorded in court 'without other proceedings against him', which suggests that the jurisdiction was doubted.

In the reign of Charles I it appears to have been the practice to examine the accused before his trial, at any rate where the case was important. In 1638, at the trial of Harrison, by indictment in the King's Bench for saying in court 'I accuse Mr. Justice Hutton of high treason', the Attorney General put in an examination of the prisoner before the Lord Chief Justice, taken before the trial, and acknowledged by the prisoner to be in his handwriting. Borrowing the language of the Star Chamber, the Attorney General said: 'His offence contained in the indictment is confessed in his examination and by himself *ore tenus*.' The jury found the defendant guilty and he was sentenced to a fine of £5,000, to imprisonment during the King's pleasure, and to go through the Courts of Westminster Hall, with a paper on his head describing his offence. But this was not all, for Mr. Justice Hutton brought an action for slander against him and obtained judgement for damages £10,000.[2]

Soon after the Revolution of 1688 the practice of questioning the prisoner at an ordinary criminal trial died out.[3] It may be observed that while it lasted this practice provided no foundation for a jurisdiction to try by the summary process of attachment and examination upon interrogatories.

[1] Cro. Car., 146.

[2] *Harrison's Case* (1638), *How. St. Tr.*, iii, 1369; Cro. Car., 503; Hutton, 131.

[3] Stephen, *Hist. Crim. Law*, i, 440.

Before the trial of the rebel lords in 1746 the Lord Chancellor and two Secretaries of State went to the Tower and were engaged from eight in the evening till one in the morning in obtaining disclosures from Murray of Broughton, who had turned King's evidence. The Lord Chancellor presided as Lord High Steward at Lord Lovat's trial the following year when Murray of Broughton was the principal witness.[1] The preliminary examination by the Privy Council of prisoners charged with state offences was recognized as lawful in the case of the man Oxford, who attempted to shoot Queen Victoria in 1840.[2]

Coke cites more than thirty instances of trial at common law otherwise than by a jury, and contempt of court is not one of them, except in the cases of an Escheator, an Attorney, and a Bailiff, who, being officers of justice, were under a disciplinary jurisdiction and subject to be tried summarily (*Abbot of Strata Marcella's Case* (1591), 9 Rep. 24 *a*, at fo. 30 *b*).

The statutes prescribing trial by examination in the place of trial by jury in certain cases have a bearing upon the subject of contempt. It is probable that the introduction and development under statute of the practice in the common law courts tended to the assertion by those courts of a wider jurisdiction in cases of contempt than they actually possessed.

Contemporaneously with the struggle of the Commons to control the jurisdiction of the Council[3] appears the first trace of a statutory power of examination conferred upon the common law courts in cases of misdemeanour. The cases to which the statutes applied were confined within narrow limits at first; in course of time the jurisdiction was enlarged and made applicable to offences, which, if there had been a common law jurisdiction to examine in cases of contempt generally, must have been already subject to that jurisdiction.

In the second year of Henry IV the Commons, in

[1] See on this and on examination by the Privy Council, *Diary of General Williamson*, Camden Soc., 3rd Series (1912), vol. xxii, pp. 124, 247–51.

[2] *State Trials, N. S.*, iv, 497.

[3] Baldwin, *The King's Council*, chaps. VI and VII.

answer to a petition to the Crown against the use of the *subpoena*, had received the indefinite reply that no such writ should be granted except where it appeared necessary. In 4 Henry IV the King promised to direct his officers to abstain more from sending for his lieges than they had done before,[1] and in this same year appears the earliest statute enacting a form of procedure by examination in the common law courts. By statute 4 Henry IV, c. 18, the Justices are to examine all the Attorneys and to put in the roll the names of those that be good and virtuous and of good fame, and the rest are to be put out by the discretion of the Justices.

By 5 Henry IV, c. 8, the Justices are to have power 'to examine Attorneys and others whom please them' in certain cases where fraud is suspected.

By 2 Henry VI, c. 7, the Justices are to have power to hear and determine complaints against offenders charged with defective tanning 'as well at the King's suit as the party's or to attaint [i. e. convict] them by examination . . . by the discretion of the Justices'.

By 8 Henry VI, c. 4, Justices of Assize are to have power to examine offenders against the statutes of unlawful liveries and impose upon them a fixed pecuniary penalty 'in the same manner and form as they ought if they were by inquest duly before the said Justices convict'.

Statute 8 Henry VI, c. 16, provides for the punishment of an Escheator who shall hold an unauthorized inquest 'and thereof by examination or otherwise at the suit of the party . . . be duly convict'.

Statute 11 Henry VI, c. 11, provides for the punishment in the King's Bench of one who assaults the Lords or Commons attending Parliament if he 'be found guilty by inquest, by examination or otherwise'.

By 18 Henry VI, c. 4, a penalty is imposed on one who breaks the rules for the trading of merchant aliens and thereof before any of the King's Judges be duly convict by his examination or otherwise at the King's suit or at the suit of his liege people.

[1] *Rot. Parl.*, iii, 446 *b*, 471 *b*, 507 *a*.

By 18 Henry VI, c. 9, every officer who issues a writ of exigent at the instance of an Attorney who has not procured his warrant of attorney to be recorded shall forfeit 40*s.* 'every time that he shall be attainted by due examinations made' by any of the Justices of the King's Bench or Common Pleas; and an Attorney whose warrant is not entered and is 'attainted by like examination' is to incur the same penalty.

By 18 Henry VI, c. 14, a party aggrieved may sue by writ or bill against a Sheriff guilty of bribery to recover ten times as much as the Sheriff has received, and the Justices are to have power to hear and determine such suits 'as well by the examination of the defendants as by trial of inquests thereof to be taken'.

By 8 Edward IV, c. 2, upon information in the King's Bench or Common Pleas or before Justices of the Peace in their session or Justices of Oyer and Terminer and Gaol Delivery, against persons giving liveries, the informer may sue for the King and himself by one bill or information. The defendant if present is to be put to answer upon the complainant's oath that his complaint is rightful, without any other process, and the Judges are to have power to examine the defendant and to judge him convicted or attainted as well by such examination as by trial after the discretion of the Judge.

In 14 Edward IV, Henry Bodrugan and another petition for the annulment of an Act of Parliament whereby the petitioners are ordered to appear in the King's Bench and answer Thomas Neville in respect of the petitioners having as alleged attempted to disseize Thomas and feloniously take away his tin. If the petitioners appear in the King's Bench the Justices are to have power to examine them touching the alleged offences, and if by examination they are found guilty, they shall receive such judgement as they should have had if they were attaint by the trial of twelve men. The petitioners failed to appear in the King's Bench, and the reason they give amongst others is that by the Act 'it was ordained that the trial of the said offences should rest and be by

examination and not by the verdict of twelve men after the common course of the law of the land, which was to your said beseechers right fearful for them for to jeopardy their lives upon'. The petition was granted and the Act annulled.[1]

By 3 Henry VII, c. 1 (*pro camera stellata*), the judicial authority thereby constituted is to have power to summon misdoers, 'and them and other by their discretions to whom the truth may be known, to examine, and such as they find therein defective, to punish them after their demerits after the form and effect of statutes thereof made, in like manner and form as they should and ought to be punished if they were thereof convict after the due order of the law'.

The Act 21 Henry VIII, c. 20, is in similar terms.

By 19 Henry VII, c. 12, the two Chief Judges (*sic*), Chief Baron, and Justices of Assize are to summon those officers upon whom the statute confers power to punish vagabonds and to examine them of the execution of the statute; and, if found defective, such officers are to suffer like punishment as if convicted by due process and course of the King's laws.

By 19 Henry VII, c. 14 (against unlawful retainers), informations are to be before the Chancellor or Keeper of the Great Seal in the Star Chamber or before the King in his Bench or before the King and his Council attending upon his most royal person, with power 'to examine all persons defendants and every of them as well by oath as otherwise and to adjudge him or them convict or attaint as well by such examination as otherwise' (s. 5). By the same Act the Chancellor or Council is to have authority to send by writ, subpoena, privy seal, warrant, or otherwise by their discretion for any offenders without any suit or information 'and the same persons to examine by oath or otherwise by their discretion' and to adjudge all such persons as shall be found guilty by verdict, confession, examination, process, or otherwise in the penalties thereby provided, as the case may require, as though they

[1] *Rot. Parl.*, vi, 132 *b*, 137 *a*, 138 *b*.

were condemned therein after the course of the common law, any offender denying upon examination, and afterwards convicted, to forfeit and also to have imprisonment by discretion of the Judges (s. 7).

By 1 Henry VIII, c. 7, Justices of Assize are to have authority to inquire as to defaults of Coroners and determine the same as well by examination as presentment.

By 3 Henry VIII, c. 3, Justices of Assize and Gaol Delivery are to have power to inquire and also by their discretions to examine persons not having bows, &c., in accordance with the statute, and such persons shall forfeit 12*d.* a month.

By 3 Henry VIII, c. 9, a person keeping visors shall forfeit 20*s.* for every visor and 'suffer imprisonment and make fine after the discretion of the Justices afore whom he is thereof convicted by examination or by inquisition after the course of the common law'.

By 14 & 15 Henry VIII, c. 2, s. 9, any stranger grieved by the Wardens of a Fellowship may by bill or information complain to the Lord Chancellor and Treasurer of England or the Justices of Assize, 'which by their examinations shall have power to hear and determine the complaint and to award amends as in their discretion they think reasonable'.

By 1 & 2 Philip and Mary, c. 13, s. 5, if a Justice of the Peace or Coroner grant bail unlawfully, the Justices of Gaol Delivery upon due proof thereof by examination before them, shall set such fine upon the offenders as they shall think meet.

By 23 Elizabeth, c. 3 (enrolment of fines and recoveries), s. 6, it shall be lawful for the Justices of the Court of Common Pleas 'upon examination in the said court to assess such fine or amerciament upon any Clerk, Sheriff, Deputy, Attorney and other person for his and their misprision, contempt and negligence for not doing or misdoing in anything of in or concerning (fines and recoveries) or any part of them or either of them, as by the said Justices of the said Court of Common Pleas for the time being shall be thought meet and convenient'.

By 35 Elizabeth, c. 2, if any person suspected to be a Jesuit, &c., being examined by any person having lawful authority, shall refuse to answer, he shall be committed to prison, there to remain until he makes answer (s. 11).

43 Elizabeth, c. 6. This statute provides that if any Sheriff, Under-Sheriff, or other person, having authority or taking upon him to break writs, make a warrant for arrest or attachment, not having the original writ or process warranting the same, upon complaint made to the Justices of Assize or to the Judges of the Court out of which the process issued, not only the party that made the warrant, but all procurers thereof shall be sent for before the same Judges by attachment or otherwise, as the Judges shall think good, and be examined thereof upon their oaths; and if the offence be confessed or proved by sufficient witnesses to the satisfaction of the Judges, the same Judges shall forthwith by force of this Act commit the offenders to gaol, there to remain without bail or mainprize until they have paid to the party grieved £10 as well as costs and damages to be set down by the Justices and £20 to Her Majesty.

1 James I, c. 22; defective tanning—'shall enquire of all the premises . . . and hear or determine the same and also by their discretions examine all persons suspected to offend this Act' (s. 50).

3 James I, c. 4; popish recusants—non-appearance of offender proclaimed to be as sufficient a conviction as upon a trial by verdict (s. 7); defendant refusing to be examined on oath to incur the danger of *praemunire* (s. 14).

3 James I, c. 13; unlawful hunting in parks—'power and authority to enquire, hear, and determine all and singular the said offences by examination of the offenders' (s. 3).

All the above acts have long since expired or been repealed.

Some other statutes provide for the punishment of officers 'by the discretion' of the Justices: 32 Henry VIII, c. 30, ss. 2, 3 (imprisonment, at discretion, of

Attorneys who fail to deliver their warrants of attorney); 35 Henry VIII, c. 6, s. 9 (setting a fine at discretion upon Jurors who fail to appear); 21 James I, c. 8 (abuse in obtaining process and bail).

Reference may also be made to the following statutes which provide for trial otherwise than according to the course of the common law: 2 & 3 Edward VI, c. 1, s. 1, and 1 Elizabeth, c. 2, s. 4, Acts of Uniformity, 'shall be thereof lawfully convicted according to the laws of this realm by verdict of twelve men or by his own confession or by the notorious evidence of the fact'; 5 & 6 Edward VI, c. 4, s. 3, fighting in churches or churchyards, 'thereof be convicted by verdict of twelve men or by his own confession or by two lawful witnesses'; 8 Elizabeth, c. 2, s. 4, vexatiously procuring a person to be arrested or attached, 'thereof be convicted or lawfully accused by indictment, presentment or by the testimony of two sufficient witnesses or more or other due proof'; 1 James I, c. 6, breach of the Act concerning labourers—confessed by the offender or proved by two witnesses; 1 James I, c. 27, preservation of game—offences to be proved by confession or by the testimony of two witnesses.

The above extracts show the statutory encroachments made upon the ordinary form of trial in the superior courts of common law from the year 1402 to the year 1640. A summary trial by examination is provided for, *inter alia*, in cases of breach of duty by officers, viz. Attorneys, Clerks of the Court, Jurors, Sheriffs and their deputies, Coroners, and Escheators; and in four instances this mode of procedure is applied to persons not officially connected with the Court who are suspected of fraud or misconduct in connexion with pending proceedings, viz. fraud in procuring actions of debt to be tried by favourable inquests (5 Henry IV, c. 8); misconduct in connexion with the inrolment of fines and recoveries (23 Elizabeth, c. 3); issuing or procuring to be issued a warrant before the original writ is lodged with the Sheriff (43 Elizabeth, c. 6); abuse in obtaining process and bail (21 James I, c. 8). If there was a summary jurisdiction at common law to

punish strangers for contempts committed out of court, it is difficult to understand why in these four instances, which are obviously cases of contempt, statutory authority was thought necessary. No other statute is found to provide for the summary punishment of contempts, such as obstruction to officers of justice in their duty, or to parties in their applications to the Court, disturbance of proceedings in court, contempts by speech or writing out of court, or abuse of the process of the Court.

Reference may be made also to the proceedings of Empson and Dudley, the arch-promoters of summary process, of whom Lord Bacon writes that they did not observe so much as the half face of justice in proceeding by indictment, but sent forth their precepts to attach men and convent them before themselves and some others at their private houses in a court of commission; and there used to shuffle up a summary proceeding by examination, without trial by jury, assuming to themselves there to deal both in pleas of the Crown and controversies civil.[1]

Writing in 1591 and referring to certain offences punishable in the Star Chamber by statute, Lambarde thus indicates the only forms of trial at law:

> and thus by the benefit of these two statutes the judicial handling of these eight offences which before did proceed, as, I partly touched, either by way of indictment or action, may now be performed without any inquest or verdict, even by the onely examination either of competent witnesses, of the parties themselves, or of both; a course which was never before permitted by the common law of the realm, wherein no trial was allowed but that only *per legale iudicium parium*, as the Great Charter itself plainly doth acknowledge (*Archeion*, pp. 171–2).

While the statutes were extending the power of the common law courts by conferring a jurisdiction to try by examination in certain cases, the influence exercised by the Star Chamber, to which it will be remembered the common law Judges were summoned to give their assistance,[2] was tending in the same direction.

[1] *History of Henry VII*, ed. Lumby, 191.
[2] Hudson, *Collect. Jurid.*, ii, 28.

In the reign of Henry VIII and subsequently the Star Chamber claimed and exercised the right to punish contempts of the common law courts which formerly would have been punished after trial by a jury. The essential part of the Star Chamber procedure was the examination of the defendant on oath upon interrogatories or *ore tenus* without oath. Hudson, whose treatise on that Court was begun in the reign of James I and completed before 1635,[1] tells us that for misdemeanour committed in any court, not only the Judges of that Court but the Star Chamber also may punish it; and he instances the unlawful alteration of pleading in the Common Pleas, razing of finable writs to save the fine, and extortions in all courts; bribery, and corruption of officers (*Collect. Jurid.*, ii, 117, 118).

That the Star Chamber down to the date of its abolition, continued to punish contempts committed against the common law courts may be gathered from the reports of Star Chamber cases that have come down to us. In 1632 an Attorney was proceeded against by the Attorney General in the Star Chamber for procuring an execution out of the Common Pleas and the arrest of the defendant without any previous judgement. The case was tried and the bill dismissed on the merits.[2] In the same year, the Attorney General by the direction of the Star Chamber brought a suit in that Court against James Casen, an Attorney, charging against him various malpractices, some of which were certainly contempts of the common law courts. Casen was fined and it was referred to the Court of King's Bench, to examine and put him out of the roll as they should see cause.[3]

[1] Scofield, *Court of Star Chamber*, vi; *Collect. Jurid.*, ii, i, *n.*

[2] *Att. Gen.* v. *Browne*, Star Chamber Reports (Camden Soc. pub.), 1886, p. 148.

[3] *Att. Gen.* v. *Casen*, *ibid.*, 116–38. During the hearing of this case a nest of young rats or mice 'came from behinde the Kings armes and ranne about upon the plaister or beames, till three or four of them fell down in the court and one lighted on my Lord Richardson's back. The Archbishop of York observed, as he said, the finger of God, in that he had pointed to the court, as it were, that as there was a nest of vermin discovered, soe that this man and such as he were worse than vermin'.

In the case of a libel, the alternative to proceeding in the Star Chamber, according to Coke, was by indictment at the common law, and, he says, if it be against a magistrate or other public person it is a greater offence.[1] In the Appendix are noted several cases in which libel or slander of the court was punished by indictment or information.

In 1679 Chief Justice Scroggs did not suggest that a libel on himself was punishable by attachment and examination, but directed an information to be filed (*Rex* v. *Radley*, *How. St. Tr.*, vii, 701).

Fuller in his *Church History* (1655),[2] in treating of the Court of High Commission, cites, as one of the arguments that had been put forward in favour of the oath *ex officio*, that in courts of record at Westminster the Judges, time out of mind, by corporal oath have examined any person whom in their discretion they suspected to have dealt lewdly about any writ, entry or rule, pleading or any such-like matter, not being capital. That it could be stated in argument that examination on oath of the defendant in the common law courts had been practised 'time out of mind' indicates at least that in 1655 some people believed the statement to be true. The Act for the abolition of the Star Chamber was fifteen years old, and it may well be that those who argued that the authority of the Star Chamber being vested in the King's Bench, the former Court had been abolished as unnecessary,[3] were prepared to contend that the examination on oath of a defendant in cases of contempt had been practised by the common law courts time out of mind. To show that this contention had no foundation in fact, it is sufficient to refer to the report of the Clerks of the King's Bench in 1630 that they could find no instances of the practice of examination except of recent date.[4]

Proof that the earliest attempt by the Court of Queen's Bench to introduce the procedure by attachment and examination for the punishment of contempt committed by

[1] Case *De libellis famosis* (1605), 5 Rep. 125.
[2] V, 107–8. [3] See p. 89, *infra*. [4] *Ibid.*

a stranger was made in the reign of Elizabeth is supplied by the following evidence.

In his manuscript *History of the Writ of Habeas Corpus*,[1] Solly-Flood records the earliest instance he discovered of an attempt by the Court of Queen's Bench to introduce a summary procedure for the punishment of contempt. In the Rule and Order Book of the Queen's Bench, Trinity, 31 Elizabeth,[2] is an order for a writ *De attachiamento super contemptum* against Thomas Becham for causing Richard Brown to be arrested by attachment for vexation only, and not declaring against him. It may be pointed out that this was the offence aimed at by the Act of 8 Elizabeth, c. 2, already cited.[3] No record of any further proceeding in the case has been found.

Solly-Flood discoverd three or four other orders of the same kind in Elizabeth's reign, of which one, in 1594, is here quoted in full from the record:

Rex v. *Edmund Ludlow and others*, Q. B., Crown Side, Rule Book I, fo. 41, Mich. 36, 37 Elizabeth.

Wiltes. Attach' super contemptum versus Edmund' Ludlow et al'pro eo quod super breve ad inquirendum de dampnis super breve de replegiari facias bonorum et catallorum Thome Gawin, Yeoman, predicti defendentes apud Novum Sarum in com. predicto riotose assemblaverunt et verberaverunt predictum Thomam Gawyn in contemptum curie hic et contra pacem dicte domine regine, etc. Et ulterius ordinandum est quod predicti defendentes examinentur super inter'[rogatoriis] et super contempt' predict' et omnibus aliis contemptibus.

This is the earliest discovered instance of an order for attachment of strangers and for their examination on interrogatories respecting a contempt, made by a court of common law.

Solly-Flood suggests that the Court of Queen's Bench, which had been called into existence for the purpose of exercising supreme jurisdiction in all offences against the peace or in contempt of the King, coveted a share of the extensive criminal jurisdiction and inquisitorial procedure

[1] See Preface, *supra*.
[2] P. R. O.; Q. B. (Crown Side), Rule Book I, temp. Elizabeth, fo. 10 *b*.
[3] Page 82, *supra*.

of the Star Chamber, and his opinion is confirmed by this attempted adoption of the practice of examination where the jurisdiction was not conferred by statute. A notion prevailed at this time that the Queen's Bench was inclined to adopt some of the methods of the courts of equity; this is indicated by the case of Welch, who in 1565 was indicted for saying, amongst other things, that the King's Bench had been made a court of conscience.[1]

However, no writs or subsequent action by the Court consequent upon any of these orders were discovered by Solly-Flood, who points out that no instance of the actual adoption of a summary proceeding for contempt previously to the reign of Charles I has been cited by Hawkins or Blackstone. It appears, nevertheless, that the practice of attachment for contempt, followed by examination by a Judge, existed in the reign of James I; see *Savage's Case* in 1618,[2] but the nature of the contempt in that case and the status of the respondent, whether officer or stranger, do not appear from the report.

It seems probable that the form of procedure in *Rex* v. *Ludlow* (Mich. 1594),[3] if it was new, was sanctioned by Sir Edward Coke, who was appointed Attorney General in the previous April. Reasons for believing that Coke was desirous of extending the jurisdiction of the Queen's Bench, will be given later.[4]

Hudson mentions *Dunckley's Case*, for razing a Writ of *Capias utlagatum* by altering the defendant's Christian name, where the matter was examined in the Court of Common Pleas, whence the writ issued, and the Judges committed the actor of the offence and fined him. Afterwards a bill was filed against him in the Star Chamber, and he was most heavily sentenced there for the same offence in the 19th year of James I.[5] There is nothing to show whether or not Dunckley was an officer of the court; if he was a stranger, the case suggests that in 1621 the Common Pleas had adopted to the full extent the practice of punishing contempt summarily, but the Court

[1] Page 240, *infra*.
[2] 2 Rolle, 43.
[3] Page 86, *supra*.
[4] See pp. 194–6, *infra*.
[5] *Collect. Jurid.*, ii, 118, 119.

of Common Pleas was generally less inclined to adopt a summary procedure to punish contempt than the King's Bench. It was to the King's Bench that the authority of the Star Chamber was said to have reverted upon the abolition of the latter Court.[1] In 1598 Anderson, Chief Justice of the Common Pleas, had declared that a man might be imprisoned for a contempt done in court, but not for a contempt out of court,[2] implying that contempt out of court could only be punished after trial in the ordinary course of law. In 1746 Sir John Willes, another Chief Justice of that Court, upon a reflection on his judicial conduct by the members of a court-martial, did not speak of proceeding by attachment, but threatened to bring an action of *Scandalum magnatum*, in which case the defendants would have had the advantage of a trial by jury.[3] In the written Judgement in *Almon's Case* is a reference to a recent case in which the Common Pleas had refused to grant an attachment for a libel on the Court.[4]

In the case of *Millar* v. *Taylor* in 1769,[5] Mr. Justice Yates, formerly a Judge of the Common Pleas, upon Star Chamber cases being cited, referred to them as proceedings in a court 'the very name whereof is sufficient to blast all precedents brought from it'. Lord Camden, a former Chief Justice of the Common Pleas, on a question of literary property, in *Donaldson* v. *Becket* (1774), in the House of Lords, spoke of Star Chamber decrees, which had been cited, as the effects of the grossest tyranny and usurpation, and the very last place in which he should have dreamt of finding the least trace of the common law, adding that he should lay out of his way the whole beadroll of citations and precedents which had been produced, and described them as 'that heterogeneous heap of rubbish which is only calculated to confound your Lordships'.[6]

Mr. Justice Park, another Judge of the same Court, followed the example of his predecessors in 1823 when he

[1] See p. 90, *infra*.
[2] *Dean's Case*, Cro. Eliz. 689.
[3] Rayner's *Digest*, 132; *Gent. Mag.*, xvi, 462–4, 598, 630.
[4] See p. 13, *supra*.
[5] 4 Burr. at p. 2374.
[6] *Parl. Hist.*, xvii, 992.

remarked that 'a contempt can only be visited summarily while the parties are yet in view of the court'.[1] We have seen also how Sir John Bosanquet, Justice of the Common Pleas, in effect expressed his dissent from Wilmot's doctrine in 1838.[2] Yet it happened that a Chief Justice of the Common Pleas was the means of establishing a doctrine completely opposed to the traditions of his Court.

In 1630 Commissioners inquired into the offices and fees of the King's Bench, and certain Clerks of the Court certified upon oath that 'For examination upon attachments of contempt we do not know what hath been anciently taken by reason of the fewness of them, but of late there hath been taken the fee of 3*s.* 4*d.*'[3] It may be observed that if one fee anciently taken had been discovered, it would have proved the amount. This document confirms the opinion that no complete case of attachment and examination is to be discovered in the King's Bench before the reign of James I. The presumption is that so far as the King's Bench undertook the punishment of criminal contempts in and before the reign of Elizabeth, it was only after trial in the ordinary course of law.

Ten years after the Commissioners' inquiry came the Act for the abolition of the Star Chamber, 16 Charles I, c. 10. The Act recites that all matters determinable in that Court may have their proper remedy and redress by the common law of the land and in the ordinary course of justice elsewhere. 'Upon the dissolution of the Star Chamber', says Mr. Justice Blackstone, 'the old common law authority of the Court of King's Bench as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice'.[4] Chief Justice Herbert is reported to have said that 'the reason of disallowing the Star Chamber was because their authority was before and now is in *banco regis* and consequently that Court unnecessary'.[5] Chief Justice Holt, in more

[1] *Stockham* v. *Trench*, 1 Bing., 365.
[2] See p. 41, *supra*.
[3] *Jus Filizarii* (1684), 221.
[4] *Blackst. Com.*, iv, 310.
[5] *Rex* v. *Johnson* (1686), Comb., 36.

guarded language, says: 'This Court [the King's Bench] hath all the lawful power that the Star Chamber had';[1] but even this seems to go too far, for there is nothing in the Act to suggest that any additional jurisdiction is thereby conferred on the King's Bench. The Star Chamber as a branch of the Council had 'lawful power', which the King's Bench did not possess;[2] it had a paramount power to punish, which was never conferred on the King's Bench, and it had also statutory powers under the Acts 3 Henry VII, c. 1, and 21 Henry VIII, c. 20, and a power to try by examination independently of the Acts.[3] Mr. Justice Blackstone tells us that the method of making the defendant answer upon oath to a criminal charge seems to have been derived to the Courts of Kings Bench and Common Pleas through the medium of the courts of equity,[4] but he does not suggest that this method of examination was derived through the Act for the abolition of the Star Chamber. The question by what means it was derived is left open. The independent powers of the Star Chamber could only have been conferred on the King's Bench by Act of Parliament, and if the Act 16 Charles I, c. 10, does not apply, to what authority does Mr. Justice Blackstone refer? The learned commentator speaks cautiously of the jurisdiction exercised by the King's Bench on the abolition of the Star Chamber. He says that into the Court of King's Bench 'hath reverted all that was good and salutary of the jurisdiction of the Court of Star Chamber'.[5] 'Reverted' implies that the common law jurisdiction, which the King's Bench had ceased to exercise in the later days of the Star Chamber, returned to the King's Bench when the Star Chamber was abolished. Upon the happening of that event the King's Bench was entitled to exercise no more extended jurisdiction than it possessed before.

The existence of a paramount power to punish in the King

[1] *Rex* v. *Abraham* (1689), Comb., 141.
[2] See Dicey, *Privy Council*, 98, 99.
[3] Stephen, *Hist. Crim. Law*, i, 173–4.
[4] *Blackst. Com.*, iv, 288.
[5] *Ibid.*, iv, 266.

is made clear by Britton, who purports to declare the law from the mouth of the King. Of the King's Bench he says:

> With respect to the Justices assigned to follow us and hold our place wheresoever we shall be in England, we will that they have cognizance of amending false judgements and of determining appeals and other trespasses committed against our peace, and that their jurisdiction and record shall extend so far as we shall authorize by our writs (I, i, 4).

Of the King's paramount jurisdiction Britton says:

> We will that our jurisdiction be superior to all jurisdictions in our realm; so that in all kinds of felonies, trespasses and contracts, and in all manner of other actions personal or real, we have power to give or cause to be given such judgement as the case requires without any other process, whenever we have certain knowledge of the truth as Judge (I, i, 2).

In the same chapter (s. 11) Britton distinguishes between the Justices who follow the King in his Court and the King in his Council. The jurisdiction of the King's Bench is limited by the terms of the King's writs. If Britton is right, the Council exerts an equitable jurisdiction, upon which there is no limitation but its own discretion to keep within constitutional bounds; but perhaps Britton unduly exalts the prerogative power,

Fleta places a limit upon the royal prerogative. Though in power the King is supreme, he must set upon it the bridle of discretion and the reins of moderation. The saying that what pleases the Prince has the power of law, is not contradictory of this, because he conforms to the royal law promulgated by his authority—that is, not that whatsoever is the King's will is established as law, but what has been laid down according to principle and right under the King's supreme authority with the advice of his magnates after due deliberation and consultation. For, in ruling his people, the King has superiors, such as the law, by which he became King, and his Court, to wit, the Earls and Barons; for the Earls (*comites*) are so called from being his companions, who, when they see the King unbridled, are bound to put a bridle upon him.[1]

[1] *Fleta*, I, xvii, 7–9; and see Bracton, *De Legibus*, fos. 34 *a*, 107 *a*;

The doctrine of the prerogative maintained by Crown lawyers under the Stuart kings was that a reserve of power, superior to the ordinary law of the land, remained in the King as part of the arbritary authority which belonged originally to the Norman sovereigns.[1]

It is submitted that the King and his Council possessed no superior authority and jurisdiction over the Star Chamber, for that Court was in fact a branch of the Council,[2] and therefore upon the abolition of the Court, the power of the Council was curtailed to the extent of the jurisdiction previously exercised by the Court. It is true that after the Star Chamber ceased to exist, courts of civil and criminal jurisdiction were established by or under the authority of the Crown in its dominions beyond the sea, and the Council entertained appeals from those Courts—a jurisdiction still exercised by the Judicial Committee of the Privy Council. This implies that the criminal jurisdiction of the King in Council was not exhausted when the Star Chamber was abolished, but this branch of the jurisdiction was distinct from that previously exercised by the Star Chamber.

Apart from the concurrent jurisdiction of the common law courts, the jurisdiction exercised by the Council in the Star Chamber, together with the statutory power of that Court, ceased to exist with the Court itself upon the passing of the Act 16 Charles I, c. 10. Section 2 of the Act shows that cases which had previously been treated as subject to the jurisdiction of the Star Chamber were for the future to be governed by the common law and not

Bracton's Note Book, i, 29–33; Holdsworth, ii, 252–6, 435, 436, 445, 446.

[1] Dicey, *Law of the Constitution*, 7th ed., 61, 420, 421. And see Vinogradoff, *Magna Carta Commemoration Essays* (Roy. Hist. Soc., 1917), p. 94.

[2] Hudson, *Collect. Jurid.*, ii, 50, 51; Dicey, *Privy Council*, 98; Maitland, *Const. Hist. Eng.*, 262; Prothero, *Statutes and Const. Documents* (1898), cii; *ibid.*, art. 'Star Chamber', *Ency. Brit.*, 9th ed.; Scofield, *Star Chamber*, 39, 40; Hawarde, *Reportes in Camera Stellata*, ed. Baildon, xl, xli; Leadam, *Sel. Cases in the Star Chamber* (Seld. Soc.), lxx, lxxi, and see note, p. 70, *supra*.

by any superior jurisdiction. The Act conferred no additional jurisdiction on any court and the common law courts remained bound by the rules of the common law. The King's prerogative to pardon criminal contempts committed by strangers out of court remained, but the prerogative to punish them summarily, disappeared with the Star Chamber.

From Style's *Practical Register* (1657) it appears that contempts were punished summarily in the King's Bench in the middle of the seventeenth century. The cases cited as authority are all later than 1640, when the Act for the abolition of the Star Chamber was passed.[1] The contempts are mostly those committed by officers or parties and include disobedience to rules of the court. No instance is cited of contempts committed out of court by a stranger being punished summarily, nor is there any case recorded of contempt committed on service of process.[2]

In the introduction to Vidian's *Entries* (1684), it is said that if any contemn or despise any rule of court, an attachment may issue to arrest the offender, who must appear personally in court and enter into recognizance and be sworn to answer to interrogatories which shall be exhibited against him, and must be examined by the Master upon oath and answer if he hath contemned any, or broken the rules of this court, and if he acquit himself, upon motion to the Court he may be discharged, but if not, he is fined by the discretion of the Court for his contempt.

This statement is not in terms confined to parties, nor is it limited to mere disobedience to a rule of court. In ordinary circumstances it would be the defendant who was served who would contemn or despise a rule of court, but a stranger might join in the act of contempt. Under such circumstances, in early days, both the party and the stranger would be tried in the ordinary course of law; in

[1] See Style, *Pract. Reg.*, titles 'attachment', 'contempt'.

[2] With regard to contempt on the service of process see pp. 108 ff., *infra*.

1684 the party, certainly, and possibly the stranger also, would have to undergo a summary trial, but this could only be by an assumption of the repealed power of the Star Chamber.[1]

It does not appear that the offence of libelling a Judge in his judicial capacity was punished by attachment and examination even in the later Stuart period.

In *Prynn's Case* (1691) Chief Justice Hale is cited as having said in an earlier case: 'If ever informations come in dispute they cannot stand but must necessarily fall to the ground',[2] from which it may be gathered that the Chief Justice would have dealt very shortly with the suggestion that a libel on the Court might be tried by attachment and examination. In *Prynn's Case* the history of information is told at length, and it is instructive on the subject of contempt and its punishment. It looks as if the abuse of informations was so notorious in the latter part of the seventeenth century that the decisions would not bear citation in later times, and so the summary process slipped in and the accused were deprived of the privilege of having their cases tried by the verdict of even one jury. In 1680 Chief Justice Scroggs tried the experiment of granting a rule at large, viz. that the *Weekly Packet of Advice from Rome*, which had contained reflections on the King and the Duke of York, should no longer be printed or published by any person whatsoever, and he caused a copy of the rule to be served on Henry Carr, the supposed author of the alleged libel. The King's Bench committed Carr for breach of the rule and refused bail, the Chief Justice saying he would 'gaol him to put him to charges'. Subsequently the same court accepted the bail previously offered, on Carr obtaining a *Habeas Corpus*. The issue of this rule at large was the basis of one of the articles of Scroggs's subsequent impeachment. Roger North says that the proceedings on the rule 'made a great noise' and were characterized as 'such an illegal invasion of property as had not been heard

[1] See also Lilly's *Practical Register* (1719), i, 620.
[2] 5 Mod. at p. 460.

of since William the Conqueror'. North thinks the rule was grounded on the law which abolished the Star Chamber, but he points out that although it is therein declared, or the Judges had resolved, that all the jurisdiction which the Star Chamber might lawfully exercise rested by law on the Court of King's Bench, it might be said that in such cases the King's Bench must proceed by indictment or information.[1]

A treatise entitled *The Doctrine of Libels discussed and examined*, published in 1728,[2] commenting on the severity of the sentences in *Dangerfield's* and *Baxter's Cases* (1685), 3 Modern, 68, 69, purports to show how the King's Bench was influenced by the Star Chamber practice in dealing with libels after the abolition of the latter Court.

> Whatever might be the practice of the King's Bench in earlier times, we find that latterly it has followed the examples laid down by the Star Chamber for punishing variously according to the nature of the offence, more especially since the suppression of that Court, when the King's Bench found left to itself the correction of a great many enormities which before were punishable in the Star Chamber (p. 132).

And again, referring to the case of *Rex* v. *Johnson* (1686), 2 Shower, K.B., 488:

> One would think that the King's Bench, by copying so closely after the Star Chamber in this reign, had a mind either to wipe away or justify the character of cruelty and severity with which that Court was charged (p. 134).

The same treatise cites a number of cases of libel from the reports, including libels on the Court or a Judge in his judicial capacity, punished by indictment or information, down to the first year of Queen Anne, but contains no suggestion of the application of a summary process.

Sheppard, the author of *The Touchstone*, in his *Action upon the Case for Slander* (1662), cites the case *De libellis famosis*, and adds: 'When the Star Chamber stood, [a

[1] *Examen*: 564–5; Howell's *State Trials*, viii, 165.

[2] Issued anonymously, but evidently the work of a lawyer. A second edition, with few variations, entitled *State Law or the Doctrine of Libels*, *&c.*, was published without date.

libel] was punishable there; now, it is punishable by indictment in the King's Bench and other courts' (p. 117).

In 1688 it was held indictable to say of a Justice of the Peace that he is a buffle-headed fellow, doth not understand the law, and hath not done justice. The Court of King's Bench said it was a scandal on the Government and as much as to say the King hath appointed an ignorant man to be a Justice of the Peace.[1] This principle is at the foundation of Wilmot's dictum in *Almon's Case*,[2] that a libel upon a Court is a reflection upon the King and imputes to him a breach of his oath to administer justice to his people; and, again (p. 255), that to libel a Judge in his judicial capacity is an impeachment of the King's wisdom and goodness in the choice of his Judges. No one will be found to suggest that Mr. Justice Wilmot, a Judge of the highest character and attainments, really endeavoured to compete for an extended jurisdiction with the worst of the Stuart judges; yet, by the judgement he proposed to deliver, he unwittingly placed himself in that position. In the year 1765 a man charged with libelling a Judge was not to be allowed the privilege conceded by the Stuart judges of a trial by jury upon an information, but was to be tried by the summary procedure of attachment and examination without any jury.

Serjeant Hawkins, in his *Pleas of the Crown*,[3] thus refers to the power of courts of record to punish contempts in the face of the Court:

> That all such courts may enjoin the people to keep silence under a pain and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the Judge, or obstinately refusing to do their duty as officers of the court; and it is said that at all such courts, except the Court-leet, may also imprison all such offenders. Also it seems that even a Court-leet is so far entrusted with the keeping of the peace within its own precinct that the Steward of it may by recognizance bind any person to the peace who shall make affray in his presence, sitting in

[1] *Rex* v. *Darby*, 3 Mod. 139. [2] Wilmot's *Notes*, 270, 271.
[3] 1st ed., vol. i, 1716; vol. ii, 1721; 8th ed., by Curwood, 1824.

the Court, or may commit him to ward, either for want of sureties or by way of punishment, without demanding any sureties of him, in which case he may afterwards impose a fine according to his discretion; from whence it follows *a fortiori* that other superior courts of record have the like power (Bk. II, ch. i, s. 15).

Hawkins refers here to immediate committal by order of the Court as distinguished from committal upon attachment, but his statement, on the face of it, appears to be not quite consistent.

Hawkins cites several authorities, the earliest being 'Year Book, 11 Henry VI, 12' (a mistake for 7 Henry VI, 12). There it was argued by Cotesmore that the Court may assess a fine upon a juror who refuses to be sworn or put him in prison at the Court's election, and that if the people make a disturbance in court, the Justices have power to order them to keep silence under a penalty. This opinion is confirmed by Brooke C.J. in his *Abridgement*, 'Fine pur contempts', 18. A distinction is thus drawn between an officer of justice and a stranger.

In a subsequent chapter under the head of 'Attachment' Hawkins says:

> An attachment is properly grantable in cases of contempts, against which for the most part all courts of record generally, but more especially those of Westminster Hall, and above all the Court of King's Bench, may proceed in a summary manner according to their discretion (Bk. II, ch. xxii).
>
> If the contempt happen to be done by a person present in court and it appear either from the confession of the party on his examination upon oath, or by the view or immediate observation of the Judges themselves, the Court may immediately record the crime and commit the offender, and also inflict such further punishment as shall seem proper (*ibid.*, s. 1).

With regard to contempt committed by a person not present in court, Hawkins says that the Court will make a rule on the party to attend and answer the complaint or a rule to show cause why an attachment should not be granted (*ibid.*). The only authority cited for this statement of the practice in the first edition of Hawkins's *Pleas of the Crown* (the second book of which was issued in

1721) is the case of *Buistone* v. *Baker* (1615),[1] which is too late by itself to establish an immemorial usage and too early to prove that this was the regular course of the Court a hundred years later. In the case referred to, an application was made to attach the Judge of the Admiralty Court for committing G., who served him with a prohibition while he was hearing a cause and was saucy, and a *Habeas Corpus* to discharge G. was also asked for. Counsel did not press for the attachment and an order was made for G.'s discharge.

No other authority being cited, the only reasonable suggestion seems to be that Hawkins had in his mind contempt on the service of process, which, as we shall see,[2] had been dealt with summarily for some time past, and by inadvertence made his statement so wide as to include every species of contempt out of court.

Further, with regard to contempts out of court, including 'contemptuous words or writings concerning the Court', Hawkins remarks:

> It seems needless to put any instances of this kind which are generally so obvious to common understanding, and therefore I shall only observe that sometimes attachments have been granted for contemptuous words concerning the rules of the Court, without making any rule to show cause why such attachments should not be granted, because it would be vain to serve him with a second rule who has despised the first (Bk. II, ch. xxii, s. 36).

In his first edition Hawkins cites in support of the last passage one case only, viz. of contemptuous words on the service of process.[3] His mind is evidently still running upon contempt of that nature. That Hawkins was not thinking of such a case as Mr. Justice Wilmot was to deal with in *The King* v. *Almon* a few years later, is made clear by his reference to slander of the Court in his first book.

> It was formerly holden that a man might be indicted for a slander of the justice of the nation by reflecting on a sentence given in any court, ecclesiastical or temporal, whether directly, as when one said that such a sentence given by the High Commission Court was against law, or obliquely, as when one said that such a sentence was just, but that the

[1] 1 Roll. Rep., 315.
[2] Pages 108 ff., *infra*.
[3] *Anon.* (1710), B. R. 1 Salk., 84.

testimonies on which it was founded were false or the affidavits equivocating. But it seems the better opinion at this day that a man cannot be indicted for any scandalous or contemptuous words spoken of or to such officers [meaning, apparently, Judges] not being in the actual execution of their office (Hawkins, *P.C.*, Bk. I, c. 6, ss. 12, 13).

In this passage the possibility of punishing such an offence summarily does not appear to be contemplated. If Hawkins had thought it possible he would certainly have made this clear when he wrote of 'contemptuous words or writings concerning the Court' in his second book, and have cited there some authority besides a case of contempt on the service of process. But the words last quoted, if read apart from the authority cited in support of them, do cover every case of libel on the Court, and it is remarkable that the earliest decision come to light that a libel on the Court can be punished summarily is in 1721, the year in which the second volume of the *Pleas of the Crown* was published.

Whether or not Hawkins helped to introduce the summary procedure in cases to which it had not previously been applied, it is clear that 'contemptuous words concerning the rules of the Court' having been treated as an obstruction of justice even though they caused no direct obstruction, it was only going a short step further to argue that a libel on the Court was punishable by attachment and examination. Mr. Justice Wilmot relies on the argument that attachments are granted constantly for 'speaking contumelious words of the rules of the Court',[1] forgetting that this practice was, as we shall see, itself an encroachment on the rule of the common law.[2]

The only distinction drawn by eighteenth-century authorities between the method of procedure on contempts in court and out of court is that for the former the offender was subject to immediate committal, while for the latter a writ of attachment issued. The old procedure by bill, and later by information, is forgotten. The Act of 1640 abolishing the Star Chamber had, according to Holt C.J.,[3]

[1] Wilmot's *Notes*, 256.
[2] See pp. 108 ff., *infra*.
[3] *Rex* v. *Abraham* (1689), Comb., 141.

thrown upon the King's Bench the duty of exercising 'all the lawful power that the Star Chamber had', and the exact nature of that duty was evidently difficult to define. The limits of the jurisdiction in the case of contempts had been confused, first by the encroachments of the Star Chamber, and secondly by abolishing that Court which had assumed an important part of the jurisdiction, without providing a clear definition of the limits of the power in future. Without reference to the early precedents, it seems to have been taken for granted, having regard to the universally acknowledged fact that the use of the summary process was lawful in the case of some contempts, that the process had been applied from time immemorial to contempts committed out of court. But the Act of 1640, while acknowledging the existence of a common law power to punish in cases in which the Star Chamber had exercised jurisdiction, did not authorize the adoption of the summary procedure of the extinct court. Those who read the Act, or the law apart from the Act, as sanctioning a summary form of process, lost sight of the fact that the old common law procedure, which was now restored, was by trial in the ordinary course of law. It is certain that the House of Commons in approving the terms of the bill on which the Act was based had no idea of perpetuating the summary procedure of the Star Chamber. Lord Clarendon tells us that the House read twice and committed a bill 'to limit and regulate the proceedings of the Star Chamber', and upon the bill being returned by the Committee, a proposal was made that 'the usurpations of the Court being not less in the forms of their proceedings than in the matter upon which they proceeded', the proper course would be utterly to abolish the Court which it was very difficult, if not impossible, to regulate. This proposal was adopted by the House, and the Bill was recommitted with instructions to alter it accordingly, and in its amended form it was passed by the Lords and received the royal assent.[1]

Previously to the latest development of the summary

[1] Clarendon, *History of the Rebellion* (ed. 1826), i, 499, 500.

process, that is to say, the introduction of the procedure to punish libel on the Court by attachment, the position was this. The King's Bench was willing to entertain such a case upon the confession of the accused and to invite that course, but if the accused, being a stranger, pleaded not guilty and claimed to be tried by a jury, this was never refused down to the year 1721.

Blackstone cites statutes to prove recognition, approval, and confirmation of the process of attachment in general, but relies on 'long and immemorial usage' to establish the method of examining the delinquent himself upon oath in cases of contempt.[1] The continuous existence of the process of attachment from the earliest times to the present day cannot be questioned, but this admission does not extend to the process in the sense in which Blackstone uses the term, viz. as an original process by which a person accused of contempt is brought up for examination. It has been shown that such a form of writ had no existence before the time of Elizabeth.[2] The ancient writ of attachment directed that the accused should be brought up to take his trial at law, and if he pleaded not guilty he was tried by a jury.

It remains to notice the cases of the first half of the eighteenth century which might be supposed to supply a foundation for Wilmot's doctrine. That the learned Judge did not cite them, suggests that, if he was acquainted with them, he did not consider that they would materially support the contention for immemorial usage. The most important of these is the decision of Lord Hardwicke when Lord Chancellor in *Roach* v. *Garvan* (1742).[3]

The name of Lord Hardwicke has been sufficient authority to establish his decision as unquestionable law, and I believe that its foundation has not been criticized in any subsequent case, unless it can be said to have been so treated by Lord Erskine, C., who, in *Ex parte Jones* (1806),[4]

[1] *Comm.*, iv, 288. The statutes cited are referred to in detail at pp. 19 ff., *supra*.

[2] Pages 86 ff., *supra*.

[3] 2 Atkyns, 469. See p. 22, *supra*.

[4] 13 Ves., 237. See p. 21, *supra*.

distinguishes it from the case before him as one of constructive contempt, and makes use of the expression 'whatever may be said as to a constructive contempt'.

When *Roach* v. *Garvan* is considered, it will be found that the case is not decided upon the basis of any existing practice of the Court. Lord Hardwicke appears to be doubtful of the jurisdiction and hard put to it to find a precedent. The contempt alleged was printing a libel on the parties to a suit, and the libel also taxed the witnesses with being 'affidavit men', in other words, men who are prepared to swear to anything that may be required on being paid for it. These offences are covered by the description of two of the three classes of contempt enumerated by the Lord Chancellor—abusing parties and prejudicing mankind before a cause is heard. His Lordship mentions a third class, viz. scandalizing the Court, which may be taken to comprise slandering or insulting the Court by words or by writing.

Apparently this third head is quoted as an instance in which a printer may be punished for printing a libel on the Court, though it will be observed that there was no complaint of scandalizing the Court in *Roach* v. *Garvan*. The Lord Chancellor cites the case of *Raikes*, a printer, who was committed for publishing in the *Gloucester Journal* a libel on Commissioners of Charitable Uses at Burford. No report of this case is to be found, but Sanders quotes the record of a case in 1740, where for a libel on the Commissioners at Burford the Solicitor for one of the parties to a suit was committed 'for his ill practice and contempt of this Court in causing the libel to be inserted in the *Gloucester Journal*'.[1] Probably this was the libel for which Raikes was punished. *Raikes's Case* was a clear instance of the summary procedure being applied in the case of scandalizing judicial officers. A similar case may also be mentioned, viz. *Re Dodd* (1736),[2] where a news-collector was committed for a libel on the Court of Chancery appearing in the *Daily Post*. It is remarkable that Lord Hardwicke cites no authority for proceeding sum-

[1] *Re Ingles*, Sanders, *Chancery Orders*, 552. [2] *Ibid.*, 538–42.

marily for the contempt of scandalizing the Court earlier than the year 1740. He does not speak of any established practice of applying such a procedure in the case of contempts committed out of court by strangers, and concludes by saying: 'Upon the whole, there is no doubt but this is a contempt of court'. It is probable that such an offence against the Court of Chancery was punished by the Star Chamber as long as it stood, and, after the abolition of that Court, by information in the King's Bench or by bill on the commom law side of the Court of Chancery, in which case the trial was before the King's Bench.

An instance of an information being directed by the Master of the Rolls to be brought in the King's Bench is found in *Hatcher's Case* in 1700.[1] An instance of a prosecution for contempt of the Court of Chancery ordered to be brought in the Petty Bag, i.e. on the common law side of the Court of Chancery, is found in *Long's Case* in 1707.[2] In both these cases the contempt was committed by an officer of the Court. That the Court of Chancery was in doubt as to the procedure for punishing contempts after the abolition of the Star Chamber is shown by the case of *Sharpe* v. *Brookes* in January 1663–4. There the Attorney General applied to the Court to punish two persons for forging a subpoena for costs. The Master of the Rolls ordered the accused to be brought into Court when the Lord Chancellor was sitting and directed the Register to search for precedents of what had been done by the Court in punishing offences of the like nature.[3]

Concurrently with the establishment of the Court of Chancery and analogous in principle and procedure to that Court, the Star Chamber came into existence.

Where punishment was to be inflicted for contempt, the offending party was generally handed over by the Court of Chancery to the Star Chamber.[4] The Star

[1] Sanders, *Chancery Orders*, 414, 415.

[2] *Ibid.*, 432.

[3] *Ibid.*, 317.

[4] Spence, *Equitable Jurisdiction of the Court of Chancery*, i, 351, 354, 689–91. See also J. B. W. Chapman, *List of Proceedings in the Star Chamber*, vol. i, A.D. 1485–1558, P. R. O.

Chamber intervened in Chancery cases of libel down to its last days; in 6 Charles I persons were fined, pilloried, and imprisoned by the Star Chamber for, *inter alia*, presenting a petition to the King alleging that the Lord Keeper had made an unjust decree;[1] and the same year one Jones was committed and fined by the same Court for a libel on a Master in Chancery.[2] It has never been suggested that on the abolition of the Star Chamber, the jurisdiction to punish criminal contempts committed against the Court of Chancery, a jurisdiction which, so far as I have been able to ascertain, the latter Court had previously exercised only with doubt, should have devolved on or reverted to that Court; yet on no other ground can the exercise of this criminal jurisdiction, from the time of Lord Hardwicke downwards, be justified.[3] The Act for the abolition of the Star Chamber recites that all matters examinable or determinable in the Star Chamber 'may have their proper remedy and redress and their due punishment and correction, by the common law of the land and in the ordinary course of justice, elsewhere'. If Lord Hardwicke was of opinion that the words 'and in the ordinary course of justice elsewhere' applied to a criminal jurisdiction of the Court of Chancery which had remained latent down to the year 1641, he would certainly have said so. Civil contempts were untouched by the Act; they had always been punishable by the Court concerned. The effect of the Act was to render criminal contempts previously punishable by the Star Chamber, punishable only by the common law and not to confer on the Court of Chancery any additional jurisdiction. Had it been found inconvenient for the Court of Chancery to send all its cases of criminal contempt to be tried in the King's Bench, that might have been cured by legislation. There was no right to assume a jurisdiction which had no previous existence. But Lord Hardwicke, in fact, founded the

[1] *Attorney General* v. *Norton* (1630), Star Chamber Rep., Rushworth Collections, Pt. ii, App. 29.

[2] *Attorney General* v. *Jones* (1630), *ibid.*, 31.

[3] See Note at the end of this Chapter (p. 117).

jurisdiction of the Court of Chancery to punish criminal contempt upon the common law. This is clear from *Roach* v. *Garvan*. First, with regard to scandalizing the Court, his Lordship says: 'Unless it is a contempt of the Court, I have no cognizance of it; for whether it is a libel against the public or private persons, the only method is to proceed at law'. Now, scandalizing the Court does not include libelling a Judge in his private capacity. It is a contempt because it is an offence against the public; it tends to obstruct the due course of justice and, as Mr. Justice Wilmot says, 'it excites in the minds of the people a general dissatisfaction with all judicial determination and indisposes their minds to obey them'.[1] To libel a minister of the public in his ministerial capacity must be a libel on the public within the meaning of Lord Hardwicke's expression, and therefore it might be said that the only method is to proceed at law. Lord Hardwicke says: 'No, because it is a contempt also, and therefore subject to a summary jurisdiction'. If the only ground for saying it is a contempt is that it is an offence against the public, it might be argued that the reason for a summary procedure vanishes. Scandalizing the Court differs from other contempts in that it does not obstruct the course of justice in a pending cause; it causes an indirect obstruction if it taints the fountain of justice,[2] and the question whether it does so or not is only fit for a jury to determine. This is not the view that commended itself to Lord Hardwicke, but it shows how his Lordship's reference to the common law may apply to the case. The Lord Chancellor refers again to the common law in regard to the fact that a printer cannot excuse himself from printing a libel by saying he had no knowledge of the contents: 'and so is the rule of law', adds his Lordship, 'and I will always adhere to the strict rules of law in these cases'. It is to the common law that Lord Hardwicke appeals, not to any absolute power (see p. 70, *supra*) of the Court of Chancery. Judged by the rules of the common law, if Wilmot's doctrine cannot be upheld, there was no more jurisdiction in

[1] Wilmot, *Notes*, 255. [2] *Ibid.*, 270.

the Court of Chancery to punish contempts out of court committed by strangers by any form of procedure whatever, than there was for a court of common law to punish them by attachment and examination.

We have seen that the Appendix to the Register of Writs (ed. 1687) contains a form of writ for the punishment of contempt returnable in the Court of Chancery.[1] The form of the title to that Appendix should be observed: 'Appendix diversa brevia, tam vetera tam recentiora, in Officiis Clerici Coronae in Cancellaria Clericorum de Cursu et aliorum Clericorum Cancellariae usitata (quae in Registro Brevium non extant), continens'. We have no information as to the date when this particular writ was framed, and for anything that appears it may have been after the abolition of the Star Chamber. If of earlier date, it may have been applicable to some forms of contempt, but that it was not applicable to contempts out of court seems certain from the doubt as to the procedure expressed by the Master of the Rolls in January 1663–4.[2]

Most of the eighteenth-century cases are referred to in the report of the Select Committee in *Sir Francis Burdett's Case*,[3] but one which the Committee does not notice may be mentioned here.

In 1713 Daniel Defoe was defendant to an information charging him with a libel on the Government in *Reasons against the Succession of the House of Hanover* and other pamphlets. His defence was that they were written ironically, but Mr. Justice Powis told him he might be hanged, drawn, and quartered for the publications. Pending the proceedings, Defoe wrote and published newspaper comments on them. On the trial of the information, the newspapers containing the comments were put into the defendant's hand and, in reply to Chief Justice Parker, he admitted responsibility for them. The Chief Justice thereupon declared that the papers were insolent libels against him in particular and against the laws, but being

[1] Page 67, *supra*, Writ No. (9).
[2] See *Sharpe* v. *Brookes*, cited at p. 103, *supra*.
[3] See pp. 22 ff., *supra*.

personally concerned, he would leave it to the other Judges to do what they thought fitting. The newspapers were then read and their Lordships agreed that they were highly insolent to the Chief Justice and a notorious contempt to the Court and committed the defendant to prison.[1] If the account of this case can be relied on, no formal proceeding was taken against the defendant in respect of the newspaper comments. The papers were put into his hand and upon his confession he was committed forthwith. The confession and also the fact that the offender was a party to the information distinguish this case from Almon's. This summary procedure upon confession without any formal process, is in conformity with the practice laid down in *Royson's Case* and in *Style's Practical Register*,[2] but it does not prove the jurisdiction to compel a stranger to answer the charge on oath when he denies the offence.

Another case not noticed by the Select Committee is *Rex* v. *Carroll* in 1744.[3] The report is not very clear, but it seems that a rule *nisi* for attachment was granted by the Court of King's Bench against one Redman, apparently a stranger, for threatening the prosecutor.

In the case of proceedings before a Justice of the Peace, the distinction between contempts in court and out of court was recognized in 1721. In the case of *Rex* v. *Revel* in that year, before the Court of King's Bench,[4] it was said by the Court that when abusive words 'are spoken in the presence of the Justice he may commit, but when it is behind his back the party can be only indicted'.

It is remarkable that the only case of earlier date than the eighteenth century cited by the Select Committee as a precedent for the punishment of libel on a court by summary procedure is that of *John de Northampton* in 18 Edward III, and in that case the defendant, an attorney, was committed on his own confession (see pp. 23, 24, *supra*).

[1] This account is taken from the *Flying Post*, a rival newspaper to Defoe's *Review* in which the comments appeared. See the *Review*, April 16 and 18, and the *Flying Post*, April 16 and 23, 1713.

[2] Pages 75, 93, *supra*. [3] 1 Wilson, 75. [4] 1 Strange, 420.

Of the ten other cases down to 1765 cited by the Select Committee, four are instances of contemptuous words of the Court or its process on being served with the process, viz. *Lawson's Case* (1713), *Hendale's Case* (1714), *Jones's Case* (1719), reported 1 Strange, 185, and *Lamb's Case* (1719). This form of contempt may constitute a direct obstruction to the course of justice by preventing the service of process, but the principle was extended, so that abusive words of the Court or a Judge or the process server, or of the writ itself, without regard to the question whether service was actually obstructed, was punished by attachment in the common law courts. No evidence has been found to show that this practice existed in those courts before the abolition of the Star Chamber. The earliest case discovered by the Select Committee is dated in 1712, and we have seen evidence of its existence in 1684.[1] Hudson says of the Star Chamber, that 'if a minister shall be reviled in the service of process, or the writ scorned or neglected, upon affidavit made thereof, the party offending shall be committed; or if the defendant shall offer to smite or strike him . . . . But if a stranger standing by commit the contempt, he is first called by process before he is committed; so was one Benwell in 1 Henry VIII for keeping a man who served a process and making him drunk, whether he would or not' (*Collect. Jurid.*, ii, 123).[2]

For proof that in early times and down to the seventeenth century contemptuous conduct on the service of process was punished upon conviction in the ordinary course of law, reference may be made to the thirty-ninth chapter of the Statute of Westminster II[3] and to the cases numbered (2), (4), (5), (6), (12), (15), (21), (23), (28), (59), (63), (78) in the Appendix, *infra*.

Cases of contempt on the service of process punished by attachment by the Court of Chancery are found in the

[1] See p. 93, *supra*.

[2] And see *Sel. Cases in the Star Chamber*, ed. Leadam (Seld. Soc.), p. cxxi.

[3] See pp. 11 ff., *supra*.

sixteenth century,[1] and the earliest rule dealing with this offence is in Lord Bacon's Orders of 1619 (No. 77).[2]

In Henry VIII's reign the Star Chamber punished an assault on the plaintiff's servant who had served a Chancery injunction, and in the following reign the same Court entertained proceedings 'for contempt of Chancery writs'.[3]

Lord Bacon's rule was reproduced in a somewhat modified form in the *Consolidated Chancery Orders* of 1860 (xlii, 2). The rule survived until 1883, when it was repealed by the Rules of the Supreme Court of that year (Appendix O) and not re-enacted. In the King's Bench in modern times the practice was governed by a rule of Trinity Term, 17 George III (1776), which provided that a rule for attachment 'for contempt of the Court in the execution of the process of the Court' should be absolute in the first instance. This appears to be the earliest common law rule regulating the punishment of that kind of contempt, and it was repealed by the Rules of Hilary Term 1853[4] and not re-enacted.

Lord Bacon's Order No. 77, above referred to, extends to 'words of scandal of the Court', but I think this must be taken to mean only in connexion with the service of process.[5] If Lord Hardwicke had supposed that this Order embraced 'scandalizing the Court' in general, he would surely have cited it in *Roach* v. *Garvan*.

The summary jurisdiction might easily be extended by steps: 1st step, disobedience to the writ; 2nd, abuse of

[1] *Rove* v. *West* (1558), Cary., 54; *Dastoines* v. *Apprice* (1580), *ibid.*, 131; *Mead* v. *Cross* (1580), *ibid.*, 137; *Aberforthe* v. *Hall and Paramore* (1598), Sanders, *Chan. Ord.*, 76.

[2] Sanders, *Chan. Ord.*, 119.

[3] Chapman's *List of Proceedings in the Star Chamber*, vol. i, pp. 221, 271.

[4] Halsbury's *Laws of England*, vii, 288, note (i). See further the following cases in which the process server was compelled to eat the parchment of the writ. *De Clifford's Case*, Pollock and Maitland, ii, 507; *De Waleys* v. *De Clare*, *Rot. Parl.*, i, 24, b; *Aberforthe* v. *Hall and Parramore*, Sanders, *Chan. Ord.*, i, 76; *Hill* v. *Norton*, *Collect. Jurid.*, ii, 123; Burn, *Star Chamber*, 87, 98.

[5] Compare Lord Clarendon's Orders, 1661 (Sanders, *Chan. Ord.*, 308).

the process server; 3rd, assaulting him; 4th, abusing the writ; 5th, abusing the Court or Judge by whose authority the writ issued; 6th, reducing the abusive words into writing and publishing them; and so the offender arrives at a libel on the Court. The first five steps, ending with abuse of the Judge, were punishable by summary procedure in the Court of Chancery under Lord Bacon's rule, and in the King's Bench after the abolition of the Star Chamber; the sixth, libelling the Court or Judge, was not so dealt with either in the Court of Chancery or at common law, where the contempt was denied, until the eighteenth century. Mr. Justice Wilmot cites the practice of granting attachments for abusing the process of the Court and the process server, and asks why printing scandalous attacks on Judges should not be punished by the same procedure,[1] but when it is shown that down to the seventeenth century the common law courts punished both offences only by the ordinary procedure at law, the argument fails for want of a common law basis. In any case, it may be reasonable that obstruction of a process server, which directly interferes with the course of justice, shall be punished summarily, but it may be argued that a libel on a Judge is an indirect contempt, and although it is at least as important that this form of contempt shall be punished, there is no reason to deprive the accused of the right to be tried by a jury, to which he would be entitled in the case of any other libel. The argument for summary procedure in such a case derives no additional force from the contention—even if it be conceded—that libelling Judges is an arraignment of the King's justice and an impeachment of his wisdom and goodness in the choice of his Judges, or that the principle is to keep a blaze of glory around them and to deter people from attempting to render them contemptible in the eyes of the public.[2] In this last passage Wilmot unconsciously applies to the Court of King's Bench an expression similar to that used by Lambarde of the Court of Star Chamber: 'This most noble and praiseworthy Court, the beames of

[1] Wilmot, *Notes*, 255–7. [2] *Ibid.*, 255, 270.

whose bright justice . . . doe blaze and spread themselves as farre as this realm is long or wide' (*Archeion*, 223).

To cite a later instance of scurrilous abuse of a Judge: in the case of *Regina* v. *Gray* (1900),[1] the Chief Justice says that the summary jurisdiction invoked in that case 'is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction, the history, purpose, and extent of which are admirably treated in the opinion of Wilmot C.J., then Wilmot J., in his *Opinions and Judgements*' (citing *Almon's Case*). The defendant in *Regina* v. *Gray* was convicted and fined £100.

Apart from the question of jurisdiction, may it not be said that this case might have had an equally, or perhaps greater, deterrent effect if there had been a prosecution in solemn form by indictment or information? Two years later, the publishers of newspaper-comments on a prosecution pending before Magistrates and tried at the Assizes after the publication, were indicted for attempting to obstruct and pervert the due course of justice. The defendants were found guilty, and the conviction was upheld by the Court for Crown Cases Reserved, the prisoners subsequently receiving sentence of six weeks' imprisonment.[2] If an indictment is suited to the case of comments on pending proceedings, it may be argued that the same remedy can be applied even with greater advantage where a libellous attack is made upon the Court. But whatever opinion may be held as to which is the more suitable procedure, the question for solution is whether Mr. Justice Wilmot was right when he claimed immemorial usage for the jurisdiction to apply a summary form of procedure.

Six of the eleven cases cited by the Select Committee in 1810,[3] extending over the period 1721 to 1731, are all instances of libel or slander on the Court of King's Bench, and deserve special consideration as the prelude to the latest phase of the procedure by attachment and examination, exhibited in *Almon's Case*. Standing by

[1] [1900] 2 Q. B., 36. [2] *Rex* v. *Tibbits*, [1902] 1 K. B., 77.
[3] See pp. 25 ff., *supra*.

themselves, they point to modern innovation rather than to immemorial usage, and Wilmot does not refer to them:

(1) The *King* v. *Barber*, K.B. Hilary, 7 George I (1721). Attachment for contemptuous words of the King's Bench in a speech to the Common Council of the City of London (1 Strange, 444).

This is the earliest case discovered in which the Court of King's Bench granted an attachment for contemptuous words of the Court, unconnected with the service of process.

The proceeding was begun in January 1721, when Sir John Pratt was Chief Justice, and the Attorney General, who presumably directed the proceeding to be taken, was Sir Robert Raymond, appointed to that office in the previous May. The Solicitor General was Sir Philip Yorke, afterwards Earl of Hardwicke.

It was alleged by the prosecution that at a meeting of the Common Council the defendant had urged the dispatch of some business for fear the King's Bench should issue a prohibition, 'and then', said he, 'good night to our liberties and privileges! and instead of a Common Council we shall sit here as a court of clouts'. He added that he was not afraid of 'any powers above'.[1] This was the offence for which the defendant was attached. He was sworn to answer interrogatories and partly examined, but before the examination was concluded he was discharged by the Act of Pardon, 7 George I, c. 29.

(2) The *King* v. *Wilkin*, K.B. Easter, 8 George I (1722). The defendant was committed by rule of court upon his confession for publishing a libel on the King's Bench, fined £5 and ordered to give security for his good behaviour for a year.

This case is connected with the next, Wilkin being the publisher of the libel for which Dr. Colbatch was fined as the author.[2]

So far as can be discovered, this is the first case in which an order for committal was made to punish a libel

[1] K. B. Misc., Interrogs. on contempts, 1714–33, 32/18 (P. R. O.).
[2] See Monk's *Life of Bentley*, 490.

on the Court. The defendant having confessed, there was no examination.

(3) *The King* v. *Colbatch*, K.B. Easter, 9 George I (1723). The defendant was attached, examined on interrogatories, committed, and discharged in a week, fined £50 and ordered to find security for good behaviour, for a libel on the King's Bench.

The defendant, Dr. Colbatch,[1] had written a tract entitled *Jus academicum*, attacking Dr. Bentley, and, as the Judges held, reflecting on the Court of King's Bench. Wilkin, the publisher (see *supra*), gave up the name of Dr. Colbatch as the author, and the latter, after examination upon interrogatories, was declared guilty of contempt.[2]

(4) *The King* v. *Wiatt*, K.B. Easter, 9 George I (1723). Rule *nisi* for attachment for publishing a libel reflecting on the King's Bench, discharged on payment of costs. Dr. Middleton was attached in Trinity Term, confessed that he was the author, and was committed. Later he was fined £50 and bound to his good behaviour (*Rex* v. *Wiatt*, 8 Modern, 123; *Rex* v. *Middleton*, Fortescue, 201).

The reports state that the libel was against a Doctor of Divinity, but it is clear that attachment would not have been granted in the case of a libel on a private individual. The libel in fact contained expressions reflecting on the Court, and the case is so indexed in the Table to 8 Modern and in Viner's *Abridgement* (vol. xv, p. 90, pl. 3).

In an *Anonymous Case* in 1731, reported in 2 Barnardiston K.B., at p. 43, where a Mrs. Mayer was attached for publishing a libel on the Court, Sir Robert Raymond, then Lord Raymond and Chief Justice of the King's Bench, said that 'it was beyond all question that attachments have been granted in these cases and particularly mentioned Dr. Middleton's case where it was so done'. Lord Raymond does not lay claim to a jurisdiction based on immemorial usage, but relies on modern practice.

(5) *The King* v. *Bolton*, K.B. Mich., 11 George I (1724). The defendant was attached and examined upon interro-

[1] See *Dict. Nat. Biog.*, sub nom.

[2] See Monk, *Life of Dr. Bentley*, 490.

gatories upon a charge of contempt alleged to have been committed by him against the Court of King's Bench.

The depositions of the defendant prove that he was Vicar of Sharnbrook, and while addressing a meeting of his parishioners in the churchyard, one Godfrey, who was prosecuting the defendant upon an indictment of forgery, threatened that he would arrest him upon a warrant of the Chief Justice, which warrant the defendant alleged had been superseded. The defendant thereupon made use of a coarse expression with regard to the warrant, and this was the contempt complained of.[1] The final result does not appear.

(6) *The King* v. *Lawley*, K.B. Mich., 5 George II (1731). The defendant, Lady Lawley, was attached for publishing a pamphlet reflecting upon the proceedings of the Court; being examined upon interrogatories and reported in contempt, she was committed and afterwards discharged on payment of a fine of five marks. The defendant had been sentenced upon indictment to a month's imprisonment and a fine of £200 for tampering with a witness. In the pamphlet complained of she purported to show that she had been wrongly convicted owing to a conspiracy against her and because the jury was partial.[2]

This is the last of the series of cases from 1721 to 1731 in which the power of the King's Bench was invoked to punish libels on the Court by attachment and examination. It is probable that, either on the bench or at the bar, Lord Raymond and Sir Philip Yorke were concerned in all of them.

The next case was *Rex* v. *Carroll* in 1744 (p. 107, *supra*), and then came Mr. Justice Wilmot's abortive judgement in *Almon's Case* in 1765. The cases of *Bingley* and *Steare* followed in 1768 (p. 16, *supra*), and although, as we have seen,[3] the doctrine of *Almon's Case* received the sanction of the Court in several decisions from 1821 onwards, we find no case in which a stranger, charged with libel or slander out of Court, of a Judge, was punished summarily by a court of common law, from the year 1768 until the year 1873, when a respondent was fined and imprisoned

[1] K. B. Misc., Interrogs. on contempts, 1714–33, 32/18 (P. R. O.).
[2] *Ibid.*
[3] See ch. iii.

for impugning the honesty and impartiality of the Chief Justice upon a rule to appear and answer for the contempt (*Regina* v. *Skipworth*, 12 Cox Criminal Cases, 371; see pp. 30–2, *supra*).

The Chancery cases down to 1846 are discussed at length by Sir T. B. Cusack-Smith, Master of the Rolls in Ireland, in the case of *Birch* v. *Walsh*.[1] The respondent to an application for attachment had published in a newspaper a garbled report of interlocutory proceedings in which he had appeared as Counsel, and it was said to be a libel on the plaintiff. The earliest case of constructive contempt, depending upon inference of intention to obstruct the course of justice, according to the learned Judge, is *Poole* v. *Sacheverel*, in 1720,[2] where a party was committed by Lord Parker, C. (afterwards Earl of Macclesfield), for inserting an advertisement offering £100 for evidence of a marriage. Then followed *Roach* v. *Garvan* in 1742 (p. 101, *supra*) and *Cann* v. *Cann* in 1754.[3] In the last-mentioned case a woman was committed for publishing, at the defendant's instance, an advertisement relating to an answer put in by the defendant. According to Turner and Venables' *Chancery Practice*, *Cann* v. *Cann* was overruled by Lord Erskine, C., in *Purcell* v. *McNamara* (1806).[4] The Master of the Rolls observed in *Birch* v. *Walsh* that there had been no case of committal for constructive contempt in a Chancery case since 1754, though in 1839 Lord Langdale M.R., in *Littler* v. *Thompson*,[5] on a motion to commit a newspaper editor for publishing reflections on the plaintiff and his witnesses before decree, ordered the respondent to pay the costs of the motion. In *Birch* v. *Walsh* the application for attach-

[1] (1846) 10 Irish Eq. Rep., 93.

[2] 1 Peer Williams, 675. This case has been disapproved in *Plating Co.* v. *Farquharson* (1881), 17 Ch. D., 49, and *Butler* v. *Butler* (1888), 13 P.D., 73.

[3] Cited from Turner and Venables' *Chancery Practice*, 5th ed., ii, 231; reported 2 Ves. Sen., 520.

[4] Cited in *Birch* v. *Walsh* from Turner and Venables' *Chan. Pract.*, 5th ed., ii, 231; see also *Memoirs of Sir Samuel Romilly*, ii, 166.

[5] 2 Beavan, 129.

ment was refused, the Master of the Rolls declaring it to be more proper that the plaintiff, if so advised, should proceed by action, information, or indictment, in which proceedings the accused would have the benefit of a trial by jury.

As *Almon's Case* has been cited down to recent times as the leading case at common law for the punishment by summary procedure of contempts committed by strangers out of court, so *Roach* v. *Garvan* has been put forward as the leading authority in Chancery. These were the principal authorities cited by the Select Committee in *Burdett's Case* after a search for precedents. For the reasons given above, it is submitted that neither of these cases is based upon immemorial usage and the established practice of the Court. To sum up, if the above conclusions are accepted: Down to the sixteenth century the form of trial in the case of criminal contempts of the superior courts of common law was as follows:

Contempts committed by strangers out of court or in the presence, but not in the actual view, of the Court, were tried like any other trespass in the ordinary course of law, i.e. by a jury, or in the Star Chamber. All contempts committed in the actual view of the Court and contempts by officers of justice, whether committed in or out of court, were tried summarily by the Court without a jury. Generally, parties to proceedings were governed by the rules which applied to strangers, but there are indications that parties were treated as more strictly amenable than strangers to the jurisdiction of the Court. In and before the fifteenth century, upon conviction of criminal contempt, the punishment was often referred by the common law courts for decision by the King's Council. From Elizabeth's reign onwards, contempts which in the common law courts would have been tried by a jury were usually tried by the Star Chamber, i.e. by a Court without a jury. Upon the abolition of the Star Chamber such contempts were tried as follows:

Libels on the Court were tried by information in the King's Bench down to the year 1721, and thenceforward by attachment and examination, and less often by informa-

tion or indictment. Other contempts out of court, when not the subject of indictment or information, were tried by attachment and examination. In 1821[1] the practice of trying criminal contempts out of court by attachment and examination, or by other summary process without a jury, was established, and that practice has been confirmed by a series of cases extending down to the present day, though indictment or information has occasionally been adopted.

Criminal contempts of the Court of Chancery were punished in the Star Chamber, and, when the latter Court ceased to exist, by information in the King's Bench or on the common law side of the Court of Chancery. In 1742[2] Lord Hardwicke established the practice of punishing this class of contempt by summary process in Chancery. This practice was followed as long as the Court of Chancery existed and has been continued in the Chancery Division of the High Court down to the present day.

NOTE. With regard to the suggestion on p. 104 that the Court of Chancery doubted its jurisdiction to punish criminal contempt, it appears that the Court did grant attachments and commit summarily for contempt out of court in some cases during the latter half of the sixteenth century (Monro, *Acta Cancellariae*; see e. g. pp. 345, 349, 350, 413, 511, 515, 528, 575, 589, 607, 697). But in *Pagit* v. *Lea* (1601), the plaintiff having obtained an order for leave to proceed in the Star Chamber in respect of certain practices, Lord Keeper Egerton declared that he need not complain to the Star Chamber for matters of contempts, practices or misdemeanours punishable in the Court of Chancery, and referred it to the Master to report which of the alleged practices, &c., were punishable in the latter Court and which not (*ibid.*, 755). The Master's Report is not in Monro's book nor is it to be found at the Record Office, and had a Report been made, it must have been known to Lord Hardwicke and to the compiler of the *Acta Cancellariae*. In 1630 the Star Chamber was still punishing contempts of the Court of Chancery, and in 1664 the latter Court again directed inquiry to be made as to its jurisdiction to deal with contempts (see pp. 103–4, *supra*). The result is not recorded.

[1] See *Rex* v. *Clement* (1821), 4 Barn. & Ald., 218.
[2] See *Roach* v. *Garvan* (1742), 2 Atk., 469.

VIII

AMERCEMENT AND FINE

Section 1. *In a Judgement.*

FORMERLY, a judgement in the superior Courts of Common Law, besides declaring that the plaintiff was entitled to relief or that he was not, contained a provision that the losing party should either be 'in the King's mercy' or that he should 'be taken [*capiatur*, i. e. imprisoned] for the King's fine'; which form was followed depended on circumstances. In cases of trespass *vi et armis*, and some others, judgement for the plaintiff was in the latter form. If judgement were for the defendant and the plaintiff had been guilty of fraud or deceit to the Court, or had sued vexatiously or been non-suit in an attaint, a *capiatur* against the plaintiff was inserted.[1] In cases to which a *capiatur* did not apply, the unsuccessful party was declared to be 'in the King's mercy' or 'in mercy', that is, he was liable to amercement; if plaintiff, he was amerced for false claim; if defendant, he was amerced for his wilful delay of justice in not immediately obeying the King's writ by rendering the plaintiff his due. In either case contempt had been committed. The payment of an amercement was enforceable by distress but not by imprisonment.[2] The amounts fixed upon affeerment were usually small, and amercement of parties to actions had become a matter of mere form in the superior Courts by the year 1478, when this was so declared, in effect, by all the Justices of the King's Bench.[3] The *capiatur* was enforced by a writ of *capias pro fine*,[4] and where *capias ad satisfaciendum* lay the King always had *capias pro fine*.[5] The last-named writ

[1] *Beecher's Case* (1609), 8 Rep., 59, 60; Jenkins, 229.

[2] *Griesley's Case* (1588), 8 Rep., 41 *a*.

[3] *Y. B.*, 18 Edw. IV, p. 9, pl. 19. As late as 1554 we find a statute providing for the affeerment by the oath of twelve men of amercements in a local court (1 & 2 Ph. and M., c. 14, s. 8).

[4] *Reg. Brev.* (*Jud.*), 31. [5] *Harbert's Case*, 3 Rep. 12 *a*.

was abolished by the Act 5 & 6 William and Mary, c. 12, and in lieu of a fine to the King it was provided that the successful plaintiff should pay 6*s.* 8*d.* to the proper officer and be allowed the amount against the defendant in his costs. Nevertheless, the forms of judgement which declared the defendant to be in mercy or directed him to be taken for a fine to the King remained in use, but as forms only, down to the passing of the Common Law Procedure Act, 1852.[1]

'The Court shall assess fines', says Coke in *Griesley's Case*,[2] 'and they shall not be affeered by others, unless it be in special cases; and that, not only upon contempts and misdemeanors done in Court, but upon writs of *capias pro fine* or upon confessions, &c.' Coke mentions the case of a juror who is fined according to the yearly value of his lands, the value being assessed by his companions of the jury, as a special case where the fine is not assessed by the Court (fo. 41 *a*).

Amercement and fine in a judgement applied to the parties to proceedings. Imprisonment, which at common law could always be avoided by making fine, was generally the penalty in cases of contempt not arising from failure or default in an action. Officers of justice were on a less favourable footing than parties or strangers, as will appear in Section 4 of the present chapter.

Amercement and fine still survive for the infliction of small pecuniary penalties in Courts Baron and Courts Leet, unaffected, it seems, by the Law of Property Acts, 1922–5.[3]

Section 2. *Amercement.*

Amercement originated in the notion that, upon conviction of an offence, the offender's liberty or property was forfeited: in other words, was in the King's mercy (*in misericordia regis*). Later, amercement applied only

[1] See Chitty's Archbold's *Practice of the Q.B.*, 8th ed. (1845), pp. 461, 462; *ibid.*, 9th ed. (1855), p. 488.

[2] (1588) 8 Rep., 40*b*.

[3] *Scriven on Copyholds* (7th ed.), 445–7; Cherry, *Lectures on the Property Acts* (1926), 4, 110, 111.

in the case of minor offences where property alone was declared in mercy, and then, in lieu of forfeiture, a sum of money was exacted, the amount being affeered by the neighbours according to the means of the offender. The procedure in the superior Courts was as follows. The Justices declared the offender to be in mercy and fixed provisionally the amount to be paid, having regard to the nature of the offence. The offender gave security for the payment by gage and pledge and the amount was afterwards affeered, according to the means of the offender, by twelve jurors in the County Court under the direction of the Sheriff.[1] In the local Courts the inquest presented the offence and the presiding officer declared the offender to be in mercy and provisionally fixed the amount of the penalty. Thereupon, the offender gave gage and pledge for the payment of the sum to be ultimately found due, and at the end of the session at least two good and lawful men, the peers of the offender, were sworn to affeer the amercements, having regard to his means.[2]

There is little doubt that amercement was introduced in England by William the Conqueror in the place of the Anglo-Saxon wite.[3] As Duke of Normandy, William established certain laws in that country which were confirmed by his successors, Robert Duke of Normandy and William Rufus, in the year 1091. These laws indicate certain offences which will bring the offender into the Duke's mercy. Molesting an opponent in court, or in coming to or returning from the court, causes the offender to be in mercy of his goods, his land, and his body; in other cases the offender is in mercy of his goods only, in others of land and goods, in others of body only.[4]

[1] Harcourt in *Eng. Hist. Rev.*, xxii, 733; McKechnie, *Magna Carta*, 288. Coke says that an amercement was affeered by the Coroners or by a jury (*Griesley's Case* (1588), 8 Rep., 39 b); see also Gilbert, *Practice of the Exchequer*, 65, 129, 130; *Blackst. Com.*, iv, 379.

[2] Pollock and Maitland, ii, 513.

[3] See Pollock and Maitland, ii, 458. For a comparison of wites with amercements see McKechnie, *Magna Carta*, 285, 286.

[4] Haskins, *Norman Institutions*, appendix D.

'*In misericordia regis*' appears in England for the first time in Domesday Book (A. D. 1086). A freeman neglects to obey the King's summons to war—touching all his land he is in the King's mercy; L. says that he held his land of the Bishop, but the Bishop fails to warrant his plea; another wrongfully takes possession of land—these last two are both declared to be in the King's mercy; a clerk who took possession of land and held it as the fee of Earl E. is adjudged to be in the King's mercy both of all his estate and of his body.[1] A distinction is drawn between an offence which brings the offender's body and estate into the King's mercy and one which involves forfeiture of his land and goods only. In the former case the offender forfeits his liberty, in the latter case his possessions only—to be redeemed in each case by a money payment, the amount of which is in the King's discretion. Though nominally the forfeiture was absolute, a scale came to be eatablished; the Court fixed the amount upon payment of which the offender could claim his liberty in cases not capital, and the amount upon payment of which he could claim to have his possessions restored was, as we have seen, affeered by his neighbours. In the one case he made fine, or end, with the King, in the other case he was amerced.

The *misericordia regis* of the Conqueror superseded the forfeitures (*forisfacturae*) of Edward the Confessor, but the older term was not given up at once. In the *Leis Williame* or *Leges Willelmi*, of which versions have come down to us in French and Latin,[2] we find '*seit en la mercie*' rendered '*erit in forisfactura*'.[3]

Henry I in his Charter of liberties (A. D. 1100) promises (s. 8) that if an offender shall have incurred a forfeiture (*forisfecerit*) he shall not give security as in mercy for all his goods, as he did in the time of the King's father and brother, but he shall make amends according to the

[1] Domesday Book (ed. 1783), i, 172 *a*, 244 *b*; ii, 449, 7.

[2] The Latin text is a translation from the French, made about 1200 (Brunner, in *Select Essays in Anglo-American Legal History*, ii, 22).

[3] *Ancient Laws and Institutes*, i, 485, s. xlii. See also Pollock and Maitland, i, 102.

measure of the offence, as he would have done in the time of the father's predecessors.[1] It does not appear that complaint has been made of forfeitures imposed for heinous offences, but because grievous pecuniary penalties have been exacted in cases where a man was in mercy for his goods. The King purchases the goodwill of his people by a promise to give up the practice of amercing heavily for minor offences and to return to the old fixed wites. Amercement was not given up, but then or later was moderated and in some instances a maximum was fixed.[2]

In the *Leges Henrici Primi* (A.D. 1109–1118), amongst things which put a man in the King's mercy are breach of his peace, contempt of his writs, injury or insult to him or his commissioners, and it is said that if the offender have bookland it shall come to the King's hand; also he who fights in the King's house shall be guilty of his life.[3]

The Pipe Roll of 31 Henry I, the earliest existing record of its kind, contains an account of the transactions of the Sheriffs and other officers accountable to the Exchequer for the year ending September 29, 1130. The older term '*forisfactura*' is employed to represent pecuniary penalties; thus we find 'Forfeitures of the Counties' (p. 2), 'Forfeitures of the Forest' (p. 54). In two instances, and it is believed in two only, '*in misericordia regis*' is found: R. owes £11 3*s.* 4*d.* of the ferm of the land of R. M. which he had in wardship and rendered nothing thence, and therefore he is in the King's mercy (p. 2); W. is in the King's mercy if the King does not warrant him touching 30*s.* which he took unjustly and returned not (p. 107).[4]

In the same roll we find '*nova placita*', that is, new in the sense of appearing for the first time. '*Placita*' are the pleas or convictions involving pecuniary penalties imposed by the Court—otherwise, amercements.

In Henry II's reign, 'to be in the King's mercy' was

[1] *Stat. of the Realm*, i, 2; Stubbs, *Sel. Chart.*, 119; Pollock and Maitland, ii, 514.

[2] Stubbs, *Sel. Chart.*, 130; Pollock and Maitland, ii, 515, *n.*

[3] *Ancient Laws and Institutes*, i, 523.

[4] *Pipe Roll*, 31 Henry I (Rec. Com.), 1833.

applicable to offences less than felony. Such offences, then known as trespasses and later as misdemeanours,[1] included contempts of the King or of his Court; if the contempt involved breach of the King's peace by force and arms, the offender's body was in the King's mercy, that is, he was liable to imprisonment as well as forfeiture of land and goods. Minor offences were punished by loss of goods only, without imprisonment, that is, the offender's goods were in mercy, and he was liable to be amerced. The King being willing to forgo the full penalty, the amount was, at any rate by Glanville's time, affeered by neighbours of the offender. We learn from the *Dialogue of the Exchequer* (A. D. 1178)[2] that an offence against the King is punished in one of three ways, according to the nature of the offence: by forfeiture of (1) movables, for less faults; (2) immovables, as estates and rents, for greater faults; (3) life and members for the greatest offences. The author does not speak of imprisonment as a punishment and makes no reference to affeerment of an amercement by the neighbours. It can hardly be doubted that, if affeerment had been the ordinary practice of the *Curia Regis* when the *Dialogue* was compiled, the author would have mentioned it. It is possible that this process had not been introduced in the King's Court at this date; if the practice was already established, the omission is remarkable. We know that a few years later amercements were affeered in the *Curia Regis*. Glanville (A.D. 1187) says that an amercement to the King is where any one has been so far amerced by lawful men of the vicinage as not to lose any part of his honourable contenement,[3] and Glanville is concerned only with the *Curia Regis*.[4]

[1] Maitland, *Constitutional History of England*, 230. For a classification of early offences see Pollock and Maitland, ii, 511, 512.

[2] ii, 16.

[3] For this word see *Oxford Eng. Dict.*, and cf. Stat. West. I, c. 6, 1 Edw. III, st. 2, c. 4, and 5 Eliz., c. 9, s. 6; *Fleta* (I, xlviii, 2), in quoting the 20th article of John's Charter, puts 'continentia' for 'contenemento'.

[4] Pollock and Maitland, i, 166.

During the reign of Henry II the development of the *misericordia* can be traced through the following records: Constitutions of Clarendon (1164), c. 10; Assize of Clarendon (1166), s. 21; Inquest of Sheriffs (1170), s. 11; Assize of Northampton (1176), s. 4; Assize of the Forest (1184), ss. 1, 11.[1] By section 1 of the last-mentioned document the King forbids offences in regard to hunting in his forests and in effect declares that in future the full penalty will be exacted and the offender's bodies will be in mercy. By section 12, if a man offend once he shall be taken by pledges, and if again, the like; but if he offend the third time no other sureties shall be taken, nor anything else but the very body of the offender.

The following are some of the amercements appearing in the Pipe Roll of 23 Henry II:[2]

The Sheriff accounts for £41. 19*s.* 8*d.* touching amercement of the county (p. 2); the hundred of S. pays 9*d.* for false judgement (p. 3); the Sheriff accounts for £73. 16*s.* 8*d.* for small amercements of men whose names are in roll 22 (p. 7); the County of Oxford pays 7*s.* 6*d.* for defaults and amercements (p. 12); £200, being amercements of the forest (p. 91); 3 marks of a suitor because he withdrew from the Justices without licence (p. 111); 3 marks of a man for unlawful disseisin (p. 111); 3 marks of another, because he swore to an assize of land which he had not seen (p. 111); 1 mark of another for default in an appeal (p. 111); 1 mark of another for a false oath (p. 111); ½ mark of another because he had not him whom he pledged (p. 111); ½ mark of another for false claim (p. 111). It may be a question whether some of these payments were not made to escape imprisonment. If so, these would at a later period have been called fines and not amercements. For the purpose of compiling the Pipe Roll it was unnecessary to distinguish those cases which involved imprisonment from those which did not.

The *misericordia* of Domesday Book expresses the

[1] Stubbs, *Sel. Charters*, 161, 167, 174, 178, 185.

[2] *Pipe Roll Society*, xxvi. The references are to the pages of the volume.

condition of being in mercy; by Henry II's reign the word is used to signify the form of punishment imposed on persons who are in mercy. We have seen that in the Pipe Roll of 23 Henry II are entries of the amercements (*misericordiae*) of the county and of the forest. Later, the penalty is called a '*mercy*'; in Year Book, 30 & 31 Edward I,[1] because the plaintiff is poor, '*la mercy*' is remitted. The amercements of *Magna Carta* are called '*mercyes*' in the seventeenth century.[2] The corresponding verb is passive only at first;[3] an early instance of this form is found in Glanville: 'the King's amercement is that by which any one is to be so far amerced (*amerciandus est*) by the oath of lawful men of the neighbourhood'.[4] In John's Charter of 1215 we have (c. 20): 'a freeman shall not be amerced (*non amercietur*)', &c. The penalties inflicted on those in mercy are sometimes called *amerciamenta*, but the term *misericordiae* is also used.[5] An early instance of the verb in its active form is found in the Statute of Marlborough (A. D. 1267), c. 18: 'No escheator . . . from henceforth shall have the power of amercing (*amerciandi*) any one for default of common summons'; 'the Justices in Eyre from henceforth shall not amerce (*non amercient*) townships' (*ibid.*, c. 24).

The 20th article of John's Charter is as follows:

A freeman shall not be amerced for a small fault unless after the manner of the fault, and for a great fault he shall be amerced after the greatness of the fault, saving his contenement;[6] and a merchant likewise, saving his merchandize; and a villein shall be amerced in the same way saving his wainage, if they have fallen into our mercy; and none of the aforesaid amercements shall be imposed except by the oath of honest men of the vicinage (*Statutes of the Realm*, i, 10).

This substantially represents the text of the Charter as it was confirmed by Edward I in 1297, except that the King's villeins have been excluded from the benefit of

[1] Rolls Series, 140.
[2] *Kitchin on Courts* (1675), 156.
[3] *Oxford Eng. Dict.*, 'amerce'.
[4] Glanville, ix, 11.
[5] In *Magna Carta*, 1215, c. 55, the word is *amerciamenta*. In 22 Edw. I the King reserves to himself the assessment of the *misericordiae* of the Archbishop of York (2 Inst., 509).
[6] For this word see p. 123, *supra*.

the twentieth (now the fourteenth) article.[1] The alteration appears first in the issue of 1217.

The Charter goes farther than Glanville in declaring that the amercement shall be after the manner of, that is, in proportion to, the fault. This imposes on the Judge the duty to have regard to the nature of the offence in fixing provisionally the amount of the amercement; the expression 'saving his contenement', his 'merchandize' and his 'wainage' is a guide to the neighbours who are to affeer the amount having regard to the offender's means.[2]

The prohibition in the twentieth article does not extend to fines, for fines are not affeered by the neighbours.[3] The article is limited to those cases in which the offenders fall into the King's mercy, and therefore it does not apply in terms to the case of a man who falls into the mercy of an inferior lord.

Glanville's definition of an amercement is also limited to an amercement to the King, but then, as we have seen, the general scope of Glanville's treatise does not extend to the courts of inferior lords.[4]

In the fourteenth article of Henry III's Charter of 1217 and subsequent issues, the word '*inciderit*' takes the place of '*inciderint*', as it appears in John's Charter.[5] It might be argued that the effect of the amendment is to limit the qualification '*si inciderit in misericordiam nostram*' to the villein. Fleta, however, reads the clause as applying also to the freeman and the merchant.[6]

Article 21 of John's Charter provides that Earls and Barons shall not be amerced except by their peers and only in accordance with the degree of the offence, and article 22 provides that a Clerk shall only be amerced in respect of his lay holding, if any.[7] According to Coke,

[1] 25 Edw. I, *Magna Carta*, art. 14: 'and a villain, other than ours, shall be amerced'.

[2] See *Fleta*, I, xlviii, 2; Harcourt in 22 *Eng. Hist. Rev.*, 733.

[3] *Bro. Abr.*, 'Amerciaments', 50; *Griesley's Case* (1588), 8 Rep at fo. 39; 2 Inst., 27.

[4] Page 123, *supra*.

[5] See art. 20 of John's Charter.

[6] *Fleta*, I, xlviii, 2.

[7] See McKechnie, *Magna Carta*, 295, 298.

the amercement of a Duke was fixed at £10 and that of an Earl at £5.[1] These amounts seem to have been fixed by the peers to prevent the House being frequently troubled to make assessments.[2] Harcourt says that there was no fixed scale for Earls and Barons in the thirteenth century, but that eventually a fixed scale came into use.[3]

The fifty-fifth article of John's Charter provides that all past fines made with the King unjustly and all amercements made unjustly shall be wholly remitted. Fines are 'made with the King' and amercements are 'made', i.e. imposed. This article was not reproduced in subsequent issues of the Charter.

The provisions of the Charter are supplemented by the Statute of Westminster I,[4] which enacts that no city, borough, nor town, nor any man be amerced without reasonable cause and according to the quantity of his trespass; that is to say, every freeman saving his contenement, a merchant saving his merchandize, a villein saving his wainage, and that by his or their peers.

It has been said that, notwithstanding the Charter, the restriction upon amercements could easily be evaded—that a man could be sent to prison and released on payment of a heavy money penalty, though he could not be amerced heavily.[5] It is submitted that to send a man to prison when he was only liable to be amerced was more than an evasion, it was a clear breach of the law. Glanville and Bracton (in his *Note Book*) show us that at the end of the twelfth century and the beginning of the thirteenth there was a distinction between offences punishable by fine and those for which only an amercement could be imposed. The amount of an amercement, having been affeered by the neighbours, could be recovered

[1] 2 Inst. 28, but see *Mirror of Justices* (Seld. Soc.), 150; *Eng. Hist. Rev.*, xxii, 737, 739.

[2] *Morgan's Case* (1723), 8 Mod., 296.

[3] Harcourt, in *Eng. Hist. Rev.*, xxii, 739; also in *His Grace the Steward*, 291.

[4] 3 Edw. I, c. 6.

[5] McKechnie, *Magna Carta*, 292.

by distress or by action of debt, and that was all; the offender could not be sent to prison. We shall see, presently, that a man sometimes made fine for an amercement;[1] if he failed to pay the fine and it had been made in the King's Court he might be imprisoned, just as he might be for breach of any other kind of fine, but then the fine would necessarily be less than the amercement.

The remedy for a man who was outrageously amerced in a Court not of record was provided by the writ *De moderata misericordia*, which, however, did not lie after an amercement had been affeered.[2] The writ recites that whereas the plaintiff was liable to be amerced for a small fault, the lord of the Court has demanded from him a grievous ransom (*gravem redemptionem*) contrary to the tenor of the Great Charter, and directs the lord to take a moderate amercement according to the degree of the offence. In the strict sense what the writ calls a grievous ransom is a grievous amercement. Ransom, like fine, was a voluntary payment to escape imprisonment, and payment could not be 'demanded' as in the case of an amercement. The writ could not apply to 'ransom' in the sense of 'fine', because that implied an agreement by the offender to pay, and he could not be heard to say that an amount he had agreed to pay was outrageous. It seems that the word 'ransom' was sometimes used to describe an excessive amercement.

It will have been observed that the writ *De moderata misericordia* as given in the Register, is made to apply to the case of an inferior lord who has imposed an excessive amercement 'contrary to the tenor of the Great Charter'. But the Charter, as we have seen, applies only to those who have fallen into the King's mercy. Perhaps the explanation of this apparent discrepancy is that by the word 'tenor' (tenorem) in the writ is to be understood 'meaning and intent' as distinguished from the actual words of the Charter, the implication being that if relief is given to those who fall into the King's mercy, *a fortiori*

[1] See p. 144, *infra*.

[2] Fitzherbert, *Natura Brevium*, fos. 74–6; *Reg. Brev. Orig.*, fo. 187.

it must apply to those who fall into the mercy of an inferior lord.

The *Register* gives a form of writ to the Steward of a manor who has assessed amercements without affeerment:

> And now we understand from the complaint of the men and tenants of the manor aforesaid that you wilfully assess those men and tenants in great sums of money when they fall into the mercy of the court of the same manor for any fault, not permitting that the same amercement be affeered by the oath of the men and tenants of the same manor. . . . (*Registrum Brevium* (*orig.*), fo. 187; Fitzherbert, *Natura Brevium*, fo. 76).

Amercement is prescribed as a punishment by several early statutes. The following are instances:

20 Henry III (Statute of Merton). Cap. 1: Those who deforce widows of their dower, '*sint in misericordia domini regis*'.

52 Henry III (Statute of Marlborough). Cap. 3: If a lord distrain his tenant for services and after it is found that the services are not due, the lord shall not be punished by ransom but shall be amerced (*amercietur*) as hitherto hath been used. Cap. 4: If a lord shall cause a distress to be driven out of the County where it was taken, he shall be punished by grievous amercement (*castigetur per gravem misericordiam*). *Ibid.*: Those who take unreasonable distresses shall be grievously amerced (*graviter amercientur*).

3 Edward I (Statute of Westminster I). Cap. 15: Those who detain prisoners replevisable, after they have offered sufficient surety, shall be in the grievous mercy of the King (*en la greve mercye le Roi*).

4 Edward I (Statute called 'Rageman'). Of those who are attainted of trespass where amercement only appertaineth, the plea shall be finally determined and amends forthwith made to the plaintiff; and concerning those who are attainted of trespass where imprisonment or ransom lieth, the trespassers shall be put by mainprise to appear before the King at the Parliament[1] next ensuing if they can

[1] i. e. the King's Bench; see Baldwin, 310.

find mainpernors, and if not, they shall abide in prison ; and the Justices shall make enquiry of their land and goods and of the manner of the trespass, and shall thereof certify the King at the same Parliament so that he may then punish them according to their desert.

6 Edward I (Statute of Gloucester). Cap. 14: Disseisors of freehold in the City of London shall be amerced (*seient amerciez*) and the amercements (*amerciemenz*) by summons of the Exchequer shall be levied to the King's use.

13 Edward I (Statute of Westminster II). Cap. 4: Where a woman is awarded dower in prejudice of the heir, the heir shall have an action to demand seisin; if the woman proves her right, the heir shall be in mercy and shall be grievously amerced (*sit heres in misericordia et amercietur graviter*) according to the discretion of the Justices.

20 Edward I, Stat. 3. Where a stranger comes in by a collateral title before judgement in an action for the recovery of land and fails to make good his claim, he shall be grievously amerced if he have whereof [to pay], and if he have not, he shall be committed to gaol at the King's will. This procedure is at variance with the common law in one sense, because at common law an amercement could not be enforced by imprisonment. But if the defendant is liable to pay an amercement and in default to go to prison, the result is the same as if the statute had said that the punishment was to be by imprisonment and fine. We see that 'fine' and 'amercement' were sometimes used in the same sense. The committal being 'at the King's will', it is submitted that by common law at this period the King in his Council alone has power to discharge the offender.[1]

The word 'forfeiture', which at one time applied to the case of a man who was 'in mercy', has lost its connexion with 'amercement' and implies 'imprisonment or fine'. The Statute of Westminster I, c. 5, declares the King's commandment, upon his grievous forfeiture (*sur sa greve*

[1] See pp. 186 ff., *infra*.

forfaiture), that no man by force of arms, nor by malice or menaces, shall disturb any to make free election. Upon these words '*greve forfaiture*' Coke says: 'that is, the disturbers to be punished by grievous fines and imprisonment'.[1] The offence is clearly one that is punishable by imprisonment or fine and not by amercement. 'Forfeiture' must be read in the sense of forfeiture of liberty, not of goods.

The Placitorum Abbreviatio of the Record Commissioners presents cases extending from John to Edward II which indicate some of the forms of contempt punishable by amercement or fine, though in a few cases it is not clear which form of punishment applies. In some cases the offender is said to be in mercy, yet he is sent to prison.[2] This does not imply that he is liable to be amerced as well as imprisoned, but that he is in mercy of his body and therefore to be taken and imprisoned until he makes fine.

The author of the *Mirror of Justices* (A. D. 1285–90) complains that notwithstanding the Great Charter, Justices, Sheriffs, and others amerce men at fixed sums according to their will and pleasure, saying, 'Put down so and so for so much for contempt (*pur despit*) or for a trespass', without weighing the trespass and without any affeerment by men sworn for the purpose, and without specifying the manner or quality of the contempt.[3] This allegation is confirmed to some extent by Britton (*circa* A. D. 1291), who says that inquiry is to be made in the Eyre as to Justices, Sheriffs, and others who have amerced people according to their own assessing or otherwise than by their peers beyond the porportion of their offence, contrary to the Great Charter (I, xxii, 13).

The complaint of the author of the *Mirror*, if well founded, shows that in the thirteenth century the Justices and other judicial officers were imposing a form of penalty which was neither amercement, because the amount was

[1] 2 Inst., 169.
[2] See, e. g., the case of William Burnell, 10 Henry III, rot. 4 (p. 103).
[3] *Mirror of Justices* (Seld. Soc.), 178.

not affeered by the neighbours, nor fine, because it was not based on a voluntary offer to pay by the offender. It was in fact the exercise of a power for which there was no foundation at common law, but which belonged to the King by virtue of his prerogative [1] and was exercised by the Council. It is true that some of the statutes of Edward I conferred such a power in the case of specific offences, but, except in the case of an officer, no authority is to be found in the early text-books, or in the Year Books, for the punishment by the courts of common law of contempt of Court by the imposition of a compulsory fine, with imprisonment as well, at the discretion of the Court. On the contrary, we find that only two forms of punishment were recognized, viz. an amercement, the amount of which was affeered, and a fine payable at the option of the offender to avoid imprisonment.

The *Mirror* says that it is an abuse to adjudge a man to several punishments for one trespass, e.g. to both corporal punishment and ransom; for, it is added, ransom is but a redemption of a corporal punishment by a money fine.[2] This is a plain statement of the rule of common law that a man cannot be amerced and imprisoned for a single offence.[3]

According to Fleta (*circa* A.D. 1290), amongst the articles to be inquired of in the Eyre is one concerning those who have been amerced without reasonable cause and not according to the measure of the fault nor by their peers, by whom they should have been amerced.[4] In another place Fleta says that civil injuries, when they are adjudicated upon, involve different punishments, pecuniary and bodily, with ransoms and grievous amercements—more grievous if the King's peace is broken.[5] If the punishment is pecuniary and certain and derived from a judgement it is to be assessed (*taxanda*) by the Judge, if uncertain it is sometimes increased or reduced according

[1] See Baldwin, *The King's Council*, 59, 64.
[2] *Mirror*, as above, 175.
[3] See pp. 164 ff., *infra*.
[4] *Fleta*, I, xx, 77. Cf. Britton, cited at p. 131, *supra*.
[5] *Fleta*, II, i, 21.

to the degree of the offence, the person injured, and the locality.[1] Referring to the Statute of Gloucester (6 Edw. I, c. 8), the author says it is provided that in all pleas in which attachments and distresses lie, if the defendant essoins himself in respect of the King's service and cannot produce a warrant, he shall pay 20*s.* damages to the plaintiff or more in the Judge's discretion, and nevertheless he shall be in the King's mercy [the statute says 'greve merci'. What follows is not in the statute]; or, if he have broken the King's peace, he shall be committed to gaol and thence redeemed according to his deserts; but since, by the difference of locality, the process of personal pleas varies, it will differ according to the Judge and according to the locality.[2] Judgement of imprisonment upon an unjust man is imprisonment in chains or the like, according to the injury to the plaintiff; nor is the defendant delivered until he has made satisfaction in damages to the party injured and grievous ransom to the King.[3] To a certain extent Fleta confirms the statements of the author of the *Mirror*. Fleta speaks of 'amercement at the King's will', which a Sheriff will suffer if he fails to obey the royal command.[4] In a case of this kind in the Year Book, about the date of Fleta's treatise, the punishment is imprisonment.[5]

Britton indicates more than two hundred offences under the degree of felony punishable by amercement, imprisonment or fine.[6] Amercement is more often applied to Sheriffs than to other officers. Defaults, &c., of parties to actions are naturally the most frequent cause of amercement, and in some cases, e. g. failing to repair bridges, &c., a stranger may be liable to amercement.

Amercement and fine sometimes apply to one and the same process. The Statute of Westminster I, c. 18, speaks of the assessment of the common fine and amercement of the whole county. According to Coke, this implies that the fine is to be affeered which in the ordinary

[1] *Ibid.*, s. 24. [2] *Fleta*, II, i, 27. [3] *Fleta*, I, xlii, 7.
[4] *Fleta*, II, lxvii, 4. [5] *Y. B.* (Rolls Series), 20–21 Edw. I, p. 148.
[6] See p. 152, *infra*.

course cannot be, and it must therefore be taken that here fine and amercement are all one.[1] Bracton tells us of 'common fines for the whole county, as in the Iter of the Justices and elsewhere, for amercements, as if the county for a trespass should fall into mercy'.[2] The fine of a county is an amercement in all respects but in name, and none of the attributes of a fine belong to it. The amount is not fixed by the Court nor is it paid to avoid imprisonment, nor is the payment optional. It is not a fine made for an amercement but the amercement itself, yet it is called a fine.[3]

The Year Books show how the principles of amercement and fine developed, especially in the fourteenth and fifteenth centuries, before the modern practice of fining and imprisoning for contempt at discretion was established, and cases occur in which the Courts are called upon to lay down the principles which distinguish the application of the two processes. Sometimes the earlier principles have been forgotten and an officer of the Court is referred to with regard to the practice. Now and then a case of amercement attracts the notice of the reporter. For instance, one who vouches another to warranty and afterwards withdraws his voucher is thus addressed by the Judge: 'For that the Court has been troubled, in that the warrantor whom you vouched was summoned, you shall be in mercy.' 'And he was,' adds the reporter.[4]

A tenant admits the plaintiff's suit, having previously denied it, and is adjudged in mercy. 'Sir,' says the plaintiff's attorney, 'forgive him the mercy for he is poor.' Berewyk J. remarks: 'You have said well for him,' but he orders the Sheriff to take pledges for the amercement.[5] Another plaintiff, being in mercy for suing in a wrong name, the mercy (*la mercy*) is remitted because he is poor.[6]

If a single juror make a presentment which the others repudiate, he is amerced.[7] An amercement assessed in

[1] 2 Inst., 196.
[2] Bracton, *De legibus*, fo. 36 *b*; and see Stat. West. I, c. 18.
[3] See *Y. B.* (Rolls Series), 30–1 Edw. I, p. 240.
[4] *Ibid.*, 21–2 Edw. I, p. 270.
[5] *Ibid.*, 30–1 Edw. I, p. 148.
[6] *Ibid.*, p. 140.
[7] *Ibid.*, p. 537.

the Bench for non-suit or the like shall be affeered afterwards by the Justices of Assize in the county where it arose.[1] A jury of the place where the cause of action arose is no doubt summoned to assist the Justices of Assize in affeering.

A plaintiff non-suit in three assizes, one after another, is amerced 5 marks for the vexation.[2]

Amercement in the Leet presented by the jury is affeered by two affeerors; *contra*, if assessed by the Steward, for this is in the nature of a fine and by this affeering it comes out of *Magna Carta*.[3] In the Leet, apparently, the affeerors had to consider, not only the circumstances of the offender but also the quantity of his fault.

A Sheriff is amerced because he returned 'I have delivered to bail' to a writ of attachment by the body.[4] Another Sheriff is questioned by Berewyk J.: 'How is it that you have attached these people without warrant, for every suit is commenced by finding pledges and you have attached though the plaintiff has not found pledges?' Sheriff: 'Sir, it was by your own orders.' The reporter adds: 'If it had not been so, the Sheriff would have been grievously amerced, therefore take heed!'[5] A Sheriff, having returned a *cepi corpus* on a *capias* against one indicted for felony, does not bring him in at the day; the Sheriff is to be amerced, not fined.[6] A bailiff who returned villeins on an assize is amerced.[7]

Upon judgement by default against the tenant in a writ of right, he was amerced, and because he was a Peer it was awarded that the amercement be assessed by his Peers according to *Magna Carta*, c. 14.[8] This shows that the amercement of a Peer was affeered in Henry VI's reign.[9]

In a case of default by a Sheriff, Fortescue C.J. says

[1] *Y. B.*, 10 Henry VI, 7, pl. 22. [2] *Y. B.*, 9 Edward IV, 31, pl. 3.
[3] *Y. B.*, 10 Henry VI, 7, pl. 22.
[4] *Y. B.* (Rolls Series), 30 & 31 Edw. I, p. 4. [5] *Ibid.*, p. 258.
[6] *Bac. Abr.*, 'Fines and amercements' (D), citing *Y. B.*, *Lib. Ass.*, 40 Edw. III, 42.
[7] *Y. B.*, *Lib. Ass.*, 26 Edw. III, 28.
[8] *Y. B.*, 1 Henry VI, 7, pl. 29.
[9] See Harcourt in *English Historical Review*, xxii, 739.

an amercement is the smallest trespass that can be, but there are general amercements which are assessed by oath of 12 men and there are special amercements which are assessed officially by the Justices, and this is one. On a fine, the party always has a day to put in pledges for his fine, and on an amercement it is not so.[1] '*Nota bene le diversite*,' adds the reporter, as if the Chief Justice were stating a principle which was in danger of being forgotten. It was necessary to fix a day for giving security for the payment of a fine, because on failure to pay the penalty was imprisonment. The payment of what Fortescue calls 'general amercements' could only be enforced by distress or action. The payment of 'special amercements', e.g. of an officer, could in effect be enforced by imprisonment, because there was power to imprison the offender by way of punishment and amerce him as well.

A Sheriff who makes a faulty return to a writ can only be amerced for it in the term in which he makes the return.[2]

In the year 1465 it was said by the Justices, after consulting the Chief Clerk of the Entries in the King's Bench, that that which is assessed by the Court upon its minister is properly called amercement and not fine. But when a stranger is guilty of misprision to the Court and shall make amends, that which is assessed upon him is called a fine.[3] By this rule, if a stranger was imprisoned, the Court was bound to fix a sum upon payment of which he was entitled to be discharged; but if an officer was imprisoned, the Court might assess a sum upon him which was an amercement, and not a fine, and therefore he could not, upon payment, claim his discharge, although the Court might think fit to grant his discharge upon payment. Thus the offender might suffer a double punishment.

In 1478, as we have seen, amercement of parties had become a matter of mere form in the superior courts.[4]

[1] *Y. B.*, 37 Hen. VI, p. 22, pl. 9.
[2] *Y. B.*, 27 Hen. VIII, p. 29, pl. 17.
[3] *Paston's Case*, *Y. B.* (Long Quinto), 5 Edw. IV, 5.
[4] See p. 118, *supra*.

Section 3. *Fine and Imprisonment—to the reign of Elizabeth.*

From what has been said in the previous sections of this chapter, it will be gathered that where a man was in mercy of his body for an offence less than felony and therefore liable to imprisonment, the period of detention was not fixed and the offender could obtain his discharge from prison by payment of a sum of money, whereby he made fine or end (*finem fecit*) with the King for his offence. It might be said that the fine was the punishment, and imprisonment was the means of enforcing payment. 'So intimate is the connexion of judicature with finance under the Norman kings', says Stubbs, 'that we scarcely need the comments of the historians to guide us to the conclusion that it was mainly for the sake of the profits that justice was administered at all.'[1] The form of judgement was not that the offender be imprisoned, simply, nor that he be fined, but that he be imprisoned for his fine: *ideo consideratum est quod praedictus A capiatur pro fine.* Any interference with the machinery which regulated the collection of the revenue was severely punished. See Britton, I, xxii, 16, p. 152, *infra*, and the case of Hengham C.J., who was fined heavily for altering a roll by reducing a fine from 13*s.* 4*d.* to 6*s.* 8*d.*, though from an innocent motive (*Y. B.*, 2 Ric. III, 10; *Blackst. Com.*, 16th ed., iii, 409, 410). Where an offence was punished by imprisonment without the option of making fine, the period of confinement was fixed and this form of penalty was prescribed by statute or royal ordinance, but not by the common law.[2]

By the 16th section of Henry II's *Assize of the Forest* (A.D. 1184), the King forbids the chasing of wild animals by night, under liability to be imprisoned for one year and to make fine and ransom at the King's will.[3] Here, imprisonment is for a year, with release afterwards upon making fine. This is an early instance of prescribing

[1] *Const. Hist.*, vol. i, s. 127. [2] See Pollock and Maitland, ii, 517.
[3] Stubbs, *Sel. Charters*, 188.

a double penalty for one offence. Bracton speaks of a prison as being a place of detention and not of punishment,[1] and this was the fact by common law; where he refers to punishment which involves 'restraint of the body, that is to say, imprisonment either for a time or in perpetuity',[2] he probably has in his mind incarceration under statute or ordinance.

Where the offence involved, or was supposed to involve, a breach of the King's peace, the offender's liberty was forfeited and he was liable at common law to be imprisoned, but, as means of increasing the royal revenue, he was encouraged, and he had the right,[3] to redeem his liberty upon payment of a sum fixed by the Court. An offender who was not an officer of justice could not be imprisoned for an offence for which he was only liable to be amerced, neither could he be amerced if his offence were punishable by fine and imprisonment.[4] If the offence deserved the heavier punishment, he could not be compelled to 'make fine'—he could not be fined in the modern sense. If he preferred to go to prison, he could go; if he had no means, he was obliged to go. Instances are recorded of men remaining in prison because they had not made fine.[5] From the twelfth century to the seventeenth, imprisonment at common law was only the means of detaining an offender, until his trial in the case of felony, and until he made fine for an offence less than felony. The same principle applied in civil cases; imprisonment was only means to an end. The *capias ad respondendum*, as its name implies, was to compel an answer by the defendant, and the *capias ad satisfaciendum* was only to detain the defendant until he paid the plaintiff's debt or damages.

Down to the seventeenth century no common law court, except by statutory power, imposed a compulsory fine in addition to imprisonment for the same offence;

[1] *De legibus*, fo. 105 a. [2] Fo. 104 b.

[3] *Bro. Abr.*, 'Imprisonment', 100.

[4] Co. Litt., 127 a; *Y. B.*, 9 Edw. III, 6; 11 Hen. IV, 55.

[5] Bracton's *Note Book*, case 351; *Y. B.* (Rolls Series), 16 Edw. III, pt. 1, p. 170; *Y. B.*, *Lib. Ass.*, 16 Edw. III, pl. 4.

in the Star Chamber as long as it stood and in the King's Bench in Charles I's reign, it was certainly done,[1] and on the abolition of the Star Chamber it was declared that the authority of that Court had before and was then in the King's Bench.[2] From that day to this, a common law power to impose the double punishment has been asserted and exercised without dispute.[3]

It may be said that there is no great difference between the ancient and the modern fine; that in the thirteenth century the Court could say to the offender, 'Pay so much to escape imprisonment', and the Court says much the same thing to-day, for failure to pay a fine involves imprisonment. The distinction lies in this, that in early days, if the offence were one to which amercement applied, the man could not be imprisoned, and if imprisonment applied, a pecuniary penalty could not be inflicted compulsorily as well, but the offender had the option of making an end of his imprisonment by payment of a sum of money, whereas at the present day, if sentence of imprisonment for an indefinite period is pronounced, as it frequently is in cases of contempt, the offender can only obtain his discharge by persuading the Court to exercise its discretion in his favour. If he succeeds, he may still be called upon to pay a pecuniary penalty or fine, and in default, his release from prison will be delayed until payment is made.

From the twelfth century onwards, a statutory power to imprison for a fixed term, and sometimes at discretion, and to impose a pecuniary penalty as well, was conferred on the common law courts in certain specified cases; and for a very long period a similar power, not founded on statute, has been exercised by those courts for the punishment of offences committed by their officers. Above and beyond the common law, the King could imprison and

[1] See, e.g., *Jeffe's Case* (1630), Cro. Car., 175.

[2] *Rex* v. *Johnson* (1686), Comb., 36.

[3] Hawkins, *P. C.*, II, ch. 48, s. 19; *Rex* v. *Thomas* (1736); Lee temp. Hardw., 278; *Skipworth's Case* (1873), L. R. 9, Q.B., 230. But Blackstone speaks of 'fine or imprisonment' for offences at common law (*Com.*, iv, 378).

impose a compulsory fine as well, for a single offence.[1] This jurisdiction was exercised by the Council and later by the Star Chamber, and was based on the conception that the King had a paramount power to punish according to his will, or, as it would be expressed now, at discretion. As Fleta shows, even the King's will is subject to restrictions.[2]

But this double penalty is applied at the present day to criminal contempt without any statutory sanction or limitation, and a curious contortion of the law has taken place. We have seen that in the thirteenth century minor contempts, such as defaults in procedure, were punished by amercement, a pecuniary penalty, recoverable only by distress or action, and contempts involving crime, by imprisonment, which the offender could escape by making fine. At the present day, defaults in procedure, not amounting to crime, are punishable by imprisonment, and criminal contempts, by imprisonment with a pecuniary penalty added or substituted; there is no power to impose a fine for the minor forms of contempt.

'*Facere finem*', as a technical term, does not appear to have been in use as early as A. D. 1130, for we do not find it in the Pipe Roll of that year,[3] but we do find '*conventio*' and '*concordia*' and entries of sums paid for privileges granted, which prove that the principle of the fine was already established. A man pays 10 marks *pro conventione* touching land between him and R. (p. 11); another pays 100 marks for breach of the peace, under a concord which the Bishop of Ely made with the King (p. 46). There are entries relating to payments for justice which came to be called fines; judges and jurors in Yorkshire pay £100 that they may be no more judges

[1] Smith, *Commonwealth of England* (ed. 1589), Bk. III, ch. 4.

[2] See *Fleta* as cited at p. 187, *infra*. For opinions on the King's paramount power exercised by the Council and the Star Chamber see Lambarde, *Archeion* (ed. 1635), pp. 98–102, 118–121, 132, 175, 176, 180, 181. As to the supreme power of the King and its restrictions see Holdsworth, ii, 252 ff., 435 ff. As to the signification of 'at the King's will', see pp. 186 ff., *infra*.

[3] *Pipe Roll*, 31 Hen. I; see p. 122, *supra*.

or jurors (p. 34); one pays 20 marks for leave to purge himself by his oath touching the judgement by iron (p. 35); another gives two ounces of gold for release from arrest (p. 43). *Conventiones* (which include *concordiae*) are voluntary payments made to the King as the consideration for the grant of some privilege—otherwise, fines. *Concordia* is the prototype of the modern Court fee; then, it was a matter of bargain with the Court; now, the amount is fixed. The fine of lands belongs to the class *conventiones*; an action is brought and put an end to by leave of the Court, upon payment of a sum of money to the King.

When a man liable to be imprisoned agreed to make fine by paying a sum of money as the price of his freedom, there was in theory a bargain between the offender and the Court. The Court fixed the amount and the day for payment, or the time within which security for the payment was to be given, but the amount fixed might not be excessive.[1] Security was given by pledges. The Court was more concerned to ensure payment of the fine for the increase of the King's revenue than to keep the offender in prison.[2]

The *Dialogue of the Exchequer* shows that an offence punishable by a pecuniary penalty—that is, for which a man may be in mercy for his goods—may, if persisted in, cause the offender to be in mercy of his body. If a Sheriff fails to come to the Exchequer when summoned, he is condemned in a money penalty for each of the first three days. On the fourth day he has proved his contempt of the King and his body is in mercy. Further on, the author says that if the Sheriff is cited and does not come or make an excuse, he loses his movable as well as immovable estates and also suffers a very heavy corporal punishment unless he can prove a necessary, not a wilful, absence (*Dialogue of the Exchequer*, ii, 2, 3).

Glanville distinguishes offences which involve a breach of the King's peace from others. The pledges of a defendant who fails to appear or essoin himself are in the

[1] Stat. 34 Edw. III, c. 1. See the complaint of the Commons in 5 Hen. IV, *Rot. Parl.*, ii, 230.

[2] Pollock and Maitland, ii, 517, 518.

King's mercy; if the matter is criminal, as for instance concerning a breach of the King's peace, and the defendant fails to appear at the third summons, his body shall be taken.[1] Sometimes the expression 'his body is in mercy' was used; later, this was given up, though we find 'that he be in mercy and he was taken', i.e. imprisoned, as late as Edward III's reign.[2] Later still, 'to be in mercy' indicated exclusively liability to a pecuniary penalty as distinguished from being 'taken for the King's fine'.

Describing a fine, Glanville says it often happens that suits brought in the King's Court may be ended by friendly composition and final concord, but by consent and licence of the King or his Justices, whether it be a plea touching land or any other thing. Such a concord is usually reduced into a joint writing by the common consent of the parties and recited before the King's Justices sitting on the bench, in whose presence each part of the writing agreeing in all particulars with the other is delivered to the party; and then Glanville gives forms of a final concord of land and an advowson, and adds that such a concord is called final because it puts an end to the business so that neither party can withdraw from it as regards the other. A party who breaks a final concord is to be amerced to the King and safely attached until he finds good security that he will henceforth keep it or make recompense; 'for', continues the author, 'it is a consequence which naturally results from acknowledging a fact in the King's Court in the presence of the King or his Justices, or undertaking to do any particular act, that the party shall be compelled to abide by or perform it'. If, however, such a concord be made in a suit touching land, then the party convicted in Court or confessing that he has not properly observed the fine, if a tenant, shall thereby lose his land, but if a demandant, his suit.[3] This is instructive with regard to the punishment of breach of

[1] Glan., i, 31.

[2] *Y. B.*, *Lib. Ass.*, 43 Edw. III, pl. 46; *Y. B.*, 42 Edw. III, 26; *Bro. Abr.*, 'Imprisonment', 5, 76, 87.

[3] Glan., viii, 1–3, 5.

a fine, whether relating to land or not. It is clear that 'any other thing' may include a plea in which crime less than felony is involved, and that a man may make fine in such a case. A fine of land and a fine in the shape of a pecuniary penalty are nearly related.

The following entries are extracted from the Pipe Roll of 23 Henry II.[1] From these we may gather that the practice of imposing amercements for minor offences and fixing the fine to be paid to avoid imprisonment for graver offences had not fully developed at this period, though the principle of making fine, under that name, is clearly established.

Fines for leave to agree (*conventiones*): A man pays 20*s.* for a fine (*pro fine*) which he made with J. de S. (p. 2); ½ mark for concord of an appeal (p. 20); £43. 11*s.* 5*d.* for fine of an appeal against B. de V. (p. 27); 40*s.* for licence to agree (p. 32); 20 marks and a charger (*dextrarium*) for a concord touching B. (p. 45); 5 marks for a convention in the King's Court between the applicant and R. de M. (p. 65); £80 for fine of a suit between a man and his sister (p. 78). *De misericordia regis pro foresta*: W. son of G. and J. the clerk 2 marks '*pro licentia concordandi*' (p. 104); £40 in respect of a fine which a man made with the King touching a debt (p. 107); £31 for fine of a duel touching land (p. 107); R. de P. 48 marks '*pro fine de recto foreste*' (p. 194); J. the Jew, 2,000 marks whereby he fined (*finivit*) with the King at Winchester (p. 201); J. Q., 250 marks of the amercement whereof he fined with the King at Winchester (p. 201).

Fines for justice or other privilege (*conventiones*): A man pays 100*s.* for an inquest with regard to the marriage portion of his mother whereof she was disseised without judgement (p. 39); another pays 10 marks for the guardianship of the son of P. de B.—apparently the sum offered is not considered sufficient and a charger (*dextrarium*) is added (p. 54); 15 marks is paid for having a record of the land of W. (p. 73); £45 for record of a duel (p. 73);

[1] Pipe Roll Society, vol. 26. The references are to the pages of the volume.

100*s.* for having an exchange of land (p. 112); 30 marks for holding a fine made in the Bishop of Salisbury's Court against W. de P. (p. 18).

The fine of J. Q. in 250 marks shows how a fine may arise out of an amercement. J. Q. having been heavily amerced, has satisfied the King or his officers that he is unable to pay more than 250 marks, and that sum being agreed upon, he makes fine and in due course pays the amount to the Sheriff, who accounts for it here. A similar instance is found as early as 5 Henry II, where, in the Pipe Roll, W. de A. renders an account of 20 marks '*pro fine misericordie*',[1] showing that '*finis*' was recognized in this sense in the year 1159.

In the entry immediately preceding that of J. Q. referred to above it will be observed that the culprit fined (*finivit*) with the King in 2,000 marks. This is a new form of the verb 'to fine' and is equivalent to 'he made fine'. It is not the Court that fines, but the offender.

The entries of fine quoted above consist of two classes: (1) Those in which the party is free from duress and makes a voluntary offer to purchase some privilege. Of this class the case of the man who pays 40*s.* 'for licence to agree' is a clear instance. (2) Those in which the fine is made to avoid imprisonment, of which the '£40 in respect of a fine which a man made with the King touching a debt' appears to be an instance. Of class (1) a later example may be cited from the Pipe Roll of 9 Richard I: 'N. & R. his son [pay] 60 marks to have the custody of the King's houses at Westminster and of the gaol of Fleet Bridge which had been their inheritance since the conquest of England, notwithstanding the fine of O. de L.'[2] An entry of a fine belonging to class (2) which shows clearly the connexion between fine and imprisonment is contained in the Pipe Roll of the 13th year of King John: 'R. de V. renders account of 2,000 marks for having the King's favour; and he owes

[1] Pipe Roll Soc., i, 44.

[2] Madox, *Hist. of the Exchequer*, i, 514; and see Pipe Roll, 2 Rich. I (Pipe Roll Soc., N.S., i, 156).

£1,000 and 5 marks, of which he ought to pay 500 marks before he comes out of prison, and then let him give security to the King by charter and by sureties.'[1]

The 40th article of the Great Charter of 1215[2] has a bearing on 'fines for justice': 'We will sell to no man, we will not deny or defer to any man either justice or right.' Fines for speedy justice and the sale of writs were not prevented by *Magna Carta*. It is true, as Professor McKechnie says, that litigation must be paid for even in the twentieth century;[3] but the principle of payment in the thirteenth century does not apply now. You do not make a bargain in the Writ Office as to the price to be paid for issuing the process; the fees are fixed and are the same to all, except that a poor person now, as then, gets his writ for nothing. You cannot now get speedier justice by paying an expedition fee; this may be done in Henry II's reign, and the author of the *Dialogue of the Exchequer* says that when any one, for the sake of having justice done him, offers the King a certain sum out of some estate or income, it is not to be understood that he is buying justice but only paying that it may be done without delay.[4] Apparently, in the twelfth century the motive for such payments had been sometimes misunderstood. In 1233 a litigant paid the King five marks for hastening his judgement, and the record says he paid them willingly.[5] The sale of writs continued and was a frequent matter of complaint by the Commons in later years.[6]

It is not until the thirteenth century that offences punishable by amercement and those punishable by imprisonment and fine are clearly distinguished. Pollock and Maitland, citing Bracton's *Note Book*, mention the following cases as involving imprisonment in a civil

[1] Madox, i, 474. The payment of money and delivery of property to the King for his favour are recorded in the *Oblata Rolls*, afterwards called the *Fine Rolls*, from the reign of John to the year 1641 (Scargill-Bird, *Guide to the Public Record Office*, 2nd ed., p. 37).

[2] The 29th article in the Charter of 1297. [3] *Magna Carta*, 395.

[4] *Dial. of the Excheq.*, ii, 23. [5] Bracton, *Note Book*, case 743.

[6] Stubbs, *Constitutional History*, ii, s. 295.

action: a vanquished defendant who has broken the King's peace with force and arms; a party who has infringed a final concord made in the King's Court; a party who falsely disputes his own deed; a party who relies on a forged charter; a party who has intruded on the King; a party who has disobeyed a writ of prohibition;[1] fraudulent misuse of the machinery of the law.[2] To these may be added the case of a defendant who fails to appear in a criminal matter and the persistent defaults of a Sheriff.[3]

If the question were asked how many of the cases in the twelfth century in which a man is recorded to have been in mercy involved a liability to imprisonment, the correct answer would probably be that the King claimed a paramount power to pronounce any judgement that seemed appropriate in all such cases, but that rules of the common law were being developed by the Judges which would be binding upon them and their successors and would regulate, amongst other things, the punishment of offences less than felony by amercement and fine. We have seen that in the thirtieth year of Henry I a man could compound a breach of the peace by a money payment[4] and this developed into the making fine for an offence. Though the offender of Henry II's reign liable to imprisonment could obtain his discharge by making fine, and if he were liable to a money penalty only, the amount was affeered by his neighbours, yet the two classes of offence sometimes appear to be indistinguishable. Probably the Judges of Henry II's time were dividing offences less than felony into two classes, those in which a money penalty without imprisonment was considered a sufficient punishment and those in which the defendant was liable to imprisonment, from which,

[1] Pollock and Maitland, ii, 519; citing Bracton, *Note Book*, cases 187, 256, 286, 351, 384, 496, 498, 566, 583, 1105; *Y. B.*, 20 & 21 Edw. I (Rolls Ser.), 41.

[2] Pollock and Maitland, as above; citing Bracton, *Note Book*, cases 10, 208, 342, 788, 980, 1443, 1633, 1946.

[3] Glanville, i, 31; *Dial. Excheq.*, ii, 2, 3.

[4] See p. 140, *supra*.

however, he could escape by paying a sum fixed by the Court. Neither the author of the *Dialogue of the Exchequer* nor Glanville says definitely when imprisonment can be awarded and when not; perhaps it is considered to be in the Judge's discretion, and though a rule of practice is being evolved, it is not yet definitely established. The question that the Judge asks himself seems to be: Does the offence involve a breach of the King's peace with force and arms, or is it such a wilful contempt of the King's authority, in some other form, as to deserve imprisonment and fine? Coke distinguishes minutely the cases to which fine and amercement apply respectively.[1] Lambarde had shown that the distinction was not clearly understood at the latter end of the sixteenth century.[2] Towards the end of the seventeenth century the distinction has been so far forgotten and is of so little importance that by the Act 16 & 17 Charles II, c. 8, s. 1, it is declared that no judgement after verdict shall be reversed by reason that a *capiatur* is entered for a *misericordia* or a *misericordia* is entered when a *capiatur* ought to have been.

Cases of punishment by fine recorded in the *Placitorum Abbreviatio* have been referred to in Section 2.[3]

We have seen that the penalty prescribed by the 16th section of the Assize of the Forest of A. D. 1184 is 'fine and ransom at the King's will'. The signification of the last four words will be considered in Section 5, *infra*;[4] the word 'ransom' calls for an explanation here.

'Ransom' (*redemptio*), like 'fine', implies a voluntary offer to pay the price of liberty. The author of the *Mirror of Justices* says that ransom is but a redemption of a corporal punishment by a money fine.[5] Britton makes a clear distinction between fine and ransom. In attaint, if the jurors are convicted of a false oath and there are extenuating circumstances, they are punished by simple fines (*par simples fins*); in the absence of such circumstances, the penalty is imprisonment and ransom.[6]

[1] *Beecher's Case* (1609), 8 Rep., 58 a.
[2] *Eirenarcha*, Bk. IV, c. 16.
[3] See p. 131, *supra*.
[4] See pp. 186 ff.
[5] *Mirror*, Seld. Soc., 175.
[6] Britton, IV, xii, 5.

A man who is punished by 'simple fine' does not escape imprisonment if he fails to pay; the only difference between that penalty and 'imprisonment and ransom' is that in the latter case the amount of the penalty is larger. In an assize of novel disseisin the Justices are to inquire who accompanied the principal disseisor, so that they and he may be punished by imprisonment and fine if convicted of disseisin with force, and if by arms, then that they may be ransomed (*par le prisone et par fins, si il soint atteintz de disseisine fete a force, et si par armes, adounc soint reinz*).[1]

The statutes of Henry III and Edward I provide that a man shall make fine for one offence and ransom for another, but they nowhere provide that fine and ransom shall be made for the same offence.[2] Later statutes revert to the term used in the *Assize of the Forest* of 1184 and provide for punishment by fine and ransom of a single offence. When this is the case, as for instance in the Act 25 Edward III (stat. i, c. 5), 'fine' may be understood in its original signification of making an end of the matter, while 'ransom' is the price paid to attain that end, but the penalty is heavier than it would be if ransom were omitted.[3] Used in the double sense, the two words are appropriately joined together. This is more clearly expressed in a statute of Henry VI which provides that an offender shall be imprisoned 'until he has made and paid fine and ransom'.[4] The connexion between fine and ransom is shown by the definition of the word 'finance', i.e., in the primary sense of putting an end to imprisonment by ransom: *les raunceons pur finaunce des prisoners Englois.*'[5]

[1] Britton, II, xxii, 5.

[2] See, e.g., *Charter of the Forest*, 1217, s. 10; Stat. of Marlborough (1267), cc. 1, 3, 4, 8; Stat. Westminster II (1285), c. 12, s. 2.

[3] *Norton's Case* (1564), Dyer, 232 a. In *A. G.* v. *Parker* (1597), Hawarde's *Reportes in Camera Stellata*, ed. Baildon, 78, it is said, 'a ransome is all that he hath, goods and land, and all that he hath in the world'; but this cannot be taken literally.

[4] 2 Hen. VI, c. 5.

[5] Statute 2 Hen. VI, c. 6; *Oxford Eng. Dict.*, 'Finance'.

The writ generally known as the *capias pro fine*, which followed upon the *capiatur* inserted in a judgement, runs: *ad satisfaciendum nobis de redemptione sua pro quadam transgressione, &c.*[1] 'Fine and ransom' is found as late as Edward VI's reign; see the statute 2 & 3 Edward VI, c. 6.

Commenting on Littleton's statement that a lord convicted of maiming his villein shall make grievous fine and ransom, Coke says:

> Ransome, *redemptio*, is here taken for a grand summe of money for redeeming of a great delinquent from some heynous crime, who is to be captivate in prison untill he payeth it. Some hold it to amount to his whole estate, and others hold that ransome is a treble fine (*Norton's Case* (1564), Dyer, 232). But in legall understanding a fine and ransome are all one . . . . And this is manifest by many authorities in all succession of ages. And this appeareth by our author in this place, for he saith 'He shall for that make grievous fine and ransome', where fine and ransome must of necessitie in his opinion be taken for all one; for if the fine and ransome were divers, then should the party that mayhemed the villeine pay two summes, one for a fine and another for a ransome, which was never done. And aptly a redemption and a fine is taken to be all one, for by the payment of the fine he reedemeth himself from imprisonment, that attendeth the fine, and then there is an end of the businesse . . . So as there is a manifest diversity betweene a ransome and an amerciament; for ransome is ever when the law inflicteth a corporal punishment by imprisonment (and so is also a fine); but otherwise it is of an amerciament as hath been said (*Coke on Littleton*, fo. 127 a).

The statutes of Henry III and Edward I show that 'ransom' is commonly used as the equivalent for 'fine'.[2] It should be noted that in the *Statutes of the Realm* the Record Commissioners translate *redemptio* by *fine*, *redimi* by *to make fine*, *estre reint* by *to make fine*, and *reintz* by *fined*. The translators are met with a difficulty when they come to *fines et redemptiones*,[3] and they render this *fines and amercements*, which is certainly incorrect. The

[1] *Reg. Brev.* (*Jud.*), 19.

[2] See 20 Hen. III, c. 3; 52 Hen. III, cc. 1, 4; 3 Edw. I, cc. 1, 4, 9, 13, 20, 32, 37; 13 Edw. I, cc. 12, 36; 28 Edw. I, c. 1; 34 Edw. I, c. 6; Stat. called 'Rageman'.

[3] 34 Edw. I, c. 6.

obvious translation *fines and ransoms* involves no confusion if the distinction between *finis*, 'fine', and *redemptio*, 'ransom', is observed. With regard to the meaning of 'ransom', the reasonable conclusion seems to be that sometimes that word alone stood for 'fine', that 'ransom' as contrasted with 'fine' indicated a heavier penalty, and that 'fine and ransom' together meant nothing more than a large fine.

It appears that the verb 'to fine', 'to be fined', was not applied at common law to an offender before the sixteenth century. The earliest approach to it in the statutes is found in the Act 1 Henry VII, c. 7 (A.D. 1485); concealment of the offence of hunting in the night is declared to be felony, but if the offender confesses, 'it shall be against the King but trespass finable'. But here the word 'finable' may be equivalent to 'redeemable by fine'. In 1516 we have in Fabyan's *Chronicle* (fo. 197 *b*), in the record of an event which took place in 1441: 'of the which prysoners some were after fyned and some punysshed by longe imprysonment'.[1] This seems to be equivalent to 'some were after set to fine', that is, the Court set or fixed the amount upon payment of which they could avoid imprisonment. Fabyan's description may imply that fine and imprisonment were independent forms of punishment, but he was not a lawyer and the passage should probably be construed: 'some of the prisoners made fine and others in default of doing so suffered long terms of imprisonment'.

It is believed that the earliest instance of the verb 'to fine' in its active form appearing in a statute is in the Act of 43 Elizabeth, c. 2, for the relief of the poor (A.D. 1601). Section 16 of that Act provides that if any treasurer elected under the Act fails to do his duty, it shall be lawful for Justices of the Peace in quarter sessions or Justices of Assize 'to fine the same treasurer by their discretion'.

From Edward III's reign onwards, fixed terms of imprisonment are commonly provided for by statute. It

[1] Fabyan died in Feb. 1512/13 (*D. N. B.*).

might be supposed that where the period of imprisonment was fixed by statute there was no escape from it by making fine with the Court. But there seems to have been a doubt. The statute 34 Edward III, c. 8, provides that a juror attainted shall have imprisonment for one year, which 'the King granteth shall not be pardoned for any fine'. Probably the earliest instance of a statutory direction 'to pay' a fine is found in an Act of Richard II. Any one attainted of doing contrary to the ordinance shall pay double damages to the injured parties and fine and ransom to the King (*paie as parties endamagez lours doubles damages et fyn et raunceon au roy*).[1] The expression is rare, but is found also in the statute 33 Henry VIII, c. 12, the Act providing for the punishment of those who strike in the King's palace whereby blood is shed. By the seventh section, the offender shall have his right hand stricken off, perpetual imprisonment during his life, and shall pay fine and ransom at the King's pleasure. Here, the word 'fine' seems to be used in the modern sense, not as a means of escaping imprisonment (the term of which is definitely for life), but as a pecuniary mulct over and above the imprisonment, and in the nature of an amercement, the amount of which is to be at the King's will.[2]

By Elizabeth's reign the common law right to escape imprisonment by making fine has been largely broken through by statute. How that result was achieved without any statutory authority in respect of the common law offence of contempt of court will be considered presently (Section 5, *infra*).

The phrase 'to forfeit' (a fixed sum), which is found as early as the reign of Henry V[3] and is common in the time of Edward IV and later sovereigns down to Elizabeth, by degrees supersedes 'fine and ransom', which disappears from the statute book in Edward VI's reign.[4] A fixed statutory penalty corresponding to the modern

[1] 7 Richard II, c. 4.

[2] See also Statutes 1 Mary, sess. 2, c. 3, s. 7; 4 & 5 Ph. and M., c. 8; 1 Eliz., c. 12.

[3] See 2 Hen. V, stat. i, c. 8.

[4] See p. 149, *supra*.

fine is introduced by the statute 45 Edward III, c. 1, and is found occasionally in the statutes down to the reign of Edward IV, and from that time till the end of Elizabeth's reign a fixed penalty is the common statutory method of punishing minor offences. When the practice is established of providing by statute a fixed money penalty, the formula is, 'shall forfeit the sum of . . .' or similar words; the word 'amercement' is not used. 'Amercement' and 'fine' become interchangeable terms to a certain extent, but 'fine' is generally used when the amount is left to the discretion of the Court. Thus we find 'to pay such fine as shall be assessed by the Justices' (1 Elizabeth, c. 12). But 'fine' is sometimes used as an exact equivalent for a fixed amercement: 'To lose and forfeit . . . £10 in name of a fine' (37 Henry VIII, c. 6). The modern 'fine', however, is not an amercement, because payment of an amercement could not be enforced by imprisonment.

Britton, as I have shown (p. 148), distinguishes between fine and ransom in speaking of disseisins. He also points out that sometimes amercement is substituted for fine or ransom. If the disseisor is convicted under colour of right, and without breach of the peace, he is to be amerced.[1] The following are some of the offences for which strangers may be subjected to imprisonment, fine, or ransom, according to Britton:

Speaking to jurors while they confer about their verdict (I, v, 9; II, xxi, 6); suborning jurors (I, v, 11); tortiously preventing the execution of judgements (I, xxi, 7); remitting fines or removing them from the roll —punishable at the King's will (I, xxii, 16); persons ready to perjure themselves for hire or through fear of any one, or procuring themselves to be put on juries, or otherwise conspiring to the hindrance of justice—to be ransomed at the King's will (I, xxii, 19); losing a writ or maliciously taking it off the file—imprisonment and grievous ransom (II, xvii, 12); stirring or crying aloud whereby a battle in an appeal of felony is disturbed —imprisonment for a year and a day (I, xxiii, 13). The

[1] Britton, II, xxii, 5.

penalty in this last case is probably fixed by some ordinance that is lost.

It has been shown by reference to the statutes that the old form 'to make fine' developed into 'to be fined'. In law-French the two terms might easily be confused—'*il fera* (or *ferra*) *fin*' and '*il ſerra* (or *ſera*) *fin*'. The latter form is not found in the Year Books, with one possible exception, so far as I have observed. In Year Book, 9 Henry VI (edition 1679), at p. 55, pl. 40, we have '*il sera fin*'. In the earlier editions of this volume the words are '*il ferra fyn*'.[1] Brooke in his *Abridgement* (edition 1576), under 'Fine pur contempts', par. 1, cites this case and quotes the words as '*il fera fine*'. Almost invariably Brooke uses the expression '*il fera fine*', but in one instance he says '*le party serra fine*'. This is in his edition of 1576 under '*Fine pur contempts*', 60; in the edition of 1586 this is altered to '*fra fin*'. It is believed that in every other instance Brooke gives '*fera fine*', as also Fitzherbert in his *Abridgement* of 1514. In Fitzherbert's *Natura Brevium* (edition 1581) we have '*fra fine*',[2] but in a later edition of this work (1616) we find '*serra fine*', at any rate in one instance.[3] In Rolle's *Abridgement* (1668), edited by Sir Matthew Hale, '*serra fine*' is invariably used.

The following are some of the offences recorded in the Year Books as punishable by imprisonment and fine, that is, as here contended, imprisonment with the alternative of fine.

Failing in an attaint (*Y. B.* (Rolls Series), 20–21 Edward I, p. 108). Harbouring an alleged felon who had been pardoned before conviction. The reporter says the Justices ordered the offender to make fine, 'rather for the King's benefit than in accordance with law, for they gave this decision *in terrorem*' (*ibid.*, 30–31 Edward I, p. 502). Not prosecuting an appeal (*ibid.*, p. 518). Upon judgement for the plaintiff in an action of debt against husband and wife, on a writing alleged to

[1] A. D. 1520, 1545, 1562, 1570, 1587, 1609.
[2] Fos. 73 D, 80 A, 110. [3] Fo. 80 A.

have been made by the wife when single, the wife alone was sent to prison. Beresford J. said that if an heir deny the deed of his father and it be found against him, he shall not be imprisoned but only amerced.[1] On the other hand, when a man is convicted of denying his own deed and is awarded to prison, he shall not be amerced, for when a man is imprisoned or makes fine he shall not be amerced (*Y. B.*, 11 Henry IV, 55; and see *Y. B.*, 9 Edward III, 6). When a man denies his own deed or pleads a false deed and it is found against him by verdict, he shall make fine and be imprisoned; but if he waives his plea before verdict and confesses, he shall be only amerced (*Y. B.*, 33 Henry VI, 54; *Y. B.*, 34 Henry VI, 20). See, however, Brooke's *Abridgement*, 'Imprisonment', 84, where it is said that he who pleads a deed which is adjudged against him by rasure, interlineation, or other suspicion, shall be imprisoned and make fine if this be found against him by jury or confession. Upon attaint brought by a defendant found guilty of trespass who was sent to prison and made no fine, held, that he must remain in prison and that the gaoler must bring him to the Court for the hearing of the attaint.[2] Refusing to admit to a corody upon the King's demand.[3] Convicted of assault on the plaintiff, though he did not touch him, defendant was condemned in half a mark and imprisoned.[4] On attaint, verdict found for the plaintiff in attaint and against the petit jury. The defendant and the petit jury imprisoned.[5] When force is found in trespass *vi et armis*, false imprisonment, or assault, the judgement is '*capiatur*' and the defendant is imprisoned for the King's fine.[6] Jurors who gave a true verdict and afterwards took money, though not by previous agree-

[1] *Y. B.* (Rolls Series), 32–33 Edward I, p 478. And see *Y. B.*, 34 Hen. VI, 24.

[2] *Y. B.* (Rolls Series), 16 Edw. III, pt. i, p. 170.

[3] *Y. B.*, *Lib. Ass.*, 38 Edw. III, pl. 22, and *Y. B.*, 44 Edw. III, p. 24, pl. 33.

[4] *Y. B.*, *Lib. Ass.*, 22 Edw. III, pl. 60.

[5] *Y. B.*, *Lib. Ass.*, 30 Edw. III, pl. 24.

[6] *Bro. Abr.*, 'Imprisonment', 53, citing *Y. B.*, *Lib. Ass.*, 22 Edw. III, pl. 87.

ment, were each put to fine at six marks; but they were not imprisoned according to the statute of *Decies tantum.*[1] A pledgor, confessing he had sworn falsely as to his means, committed until he made fine.[2]

Cotesmore, who had acted as a Justice of Assize and was afterwards Chief Justice of the Common Pleas, thus lays down the law with regard to fines and amercements, in the year 1428:

> There are in this Court [Common Pleas] fines and amercements, and amercements are affeered by the country and fines are assessed by the discretion of the Justices. And if a juror at the bar will not swear, you assess a fine upon him or put him in prison at your election; and if the people at a sessions make a great noise and disturbance, the Justices have power to command them to keep silence under a penalty. So also the Steward, who is justice in the Leet, if they [the jurors] will not do their office, has power to command them under a certain penalty. And the Leet is the oldest court in the land and has power to enquire of all manner of felonies and treasons, except of the death of a man and the rape of a woman (*Y. B.*, 7 Henry VI, p. 12, pl. 17).

From this we gather that a juror, as an officer of justice, may be fined in the modern sense or imprisoned, at the option of the Judge. If people at a sessions (that is, strangers) make a disturbance, they may be ordered to keep silence under a penalty. This indicates a pecuniary penalty, and by this course an offender is bound by the order and becomes in a sense a party to proceedings. If the penalty accrues it is a fine in the modern sense, and payment can be enforced by imprisonment, in the superior Courts at all events.

Where a defendant was attached for disobedience to a writ of prohibition he was allowed to find mainpernors, though he was warned that if he appealed to Rome the mainpernors would be held to ransom at the King's will without being allowed to make fine as in respect of a common mainprize (*Y. B.* (Rolls Series), 20 Edward III, part i, p. 524). An offender had as a rule the right to

[1] *Y. B.*, *Lib. Ass.*, 39 Edw. III, pl. 19; Stat. 38 Edw. III, st. i, c. 12.

[2] *Y. B.*, 7 Hen. VI, 25. See also Cases (46), (55), (56), (57), in the Appendix.

find mainpernors until he had made fine, but in the case of officers, the Court could refuse mainprize.[1] The amount of the fine was in the discretion of the Court, subject to the provision that it must be proportioned to the offence.[2] The Court was no doubt guided by recognized rules in fixing the amount; for instance, in the year 1500 a rule was laid down that the fine on conviction of hunting in a warren should be greater than in trespass.[3]

Brooke, citing Year Books,[4] remarks: 'It seems that in all cases where the defendant shall be imprisoned, he shall make fine to the King.' It appears, therefore, that in the middle of the sixteenth century, when Brooke's *Abridgement* was published, a stranger convicted of contempt had still the right to escape imprisonment by making fine.

The cases noted in the Appendix prove that in early days the Council was frequently appealed to in matters of contempt. Sometimes the Council pronounced sentence after a conviction at common law and assessed the amount of amercement or fine;[5] sometimes it referred the matter to be tried at common law;[6] sometimes it dealt with the matter from beginning to end.[7]

Section 4.—*Officers of justice as distinguished from strangers.*

'Officers of justice' may be taken to include Sheriffs, Attorneys, Jurors, Gaolers, &c., as well as officials permanently under the control of the Court. A 'stranger' guilty of contempt of court has already been defined as any person, not an officer of justice or a party to proceedings, who is guilty of an offence which obstructs or tends to obstruct the administration of justice.[8] The rules

[1] See pp. 161 ff. [2] Stat. 34 Edw. III, c. 1.

[3] *Y. B.*, 15 Hen. VII, p. 16, pl. 9.

[4] *Bro. Abr.*, 'Imprisonment', 19, 100; *Y. B.*, 19 Hen. VI, p. 6, pl. 13; 38 Edw. III, *Lib. Ass.* 22. And see *Bro. Abr.*, 'Contempts' and 'Fine pur contempts and offences', *passim*.

[5] Appendix Cases (10), (14), (45), (56), (62), (70).

[6] *Ibid.* (8), (25), (26), (41). [7] *Ibid.* (7). [8] Page 44.

which govern the punishment of strangers by imprisonment for contempt of court will be found in Section 3, *supra*. The present section will be restricted, generally, to showing the distinction which applied in the punishment of officers of justice.

The Court has exercised a disciplinary and summary jurisdiction over its own officers from an early date. It has been said with regard to contempts committed by officers that they are presumed to be always present in Court, and on this ground any misconduct by them is punishable summarily as for a contempt *in facie*.[1]

As a general rule, contempts committed by officers of justice, not being punishable for the purpose of enforcing a civil right between party and party, are of a criminal nature.

The twentieth article of John's *Magna Carta*[2] does not extend to officers of justice, whose amercements are assessed by the Court and not by a jury.[3]

Britton shows that in the thirteenth century the law made provision for this class of contempt. He specifies many offences of officers, the punishments for which are amercement, fine and ransom, or punishment at the King's will.[4] The author of the *Mirror of Justices* says that Coroners, Escheators, Sheriffs, Bailiffs, and other officers guilty of wrongs against the King and the people are punished like other men, and in addition they are punished at the King's will; and that the King's ministers are to be more severely charged because of their broken faith.[5]

The Statute of Westminster I (1275), c. 32, provides for the punishment of purveyors who take more horses or

[1] Style, *Practical Register*, 4th ed., 59, tit. 'Amercement'; Hudson, *Star Chamber*, Collect. Jurid., ii, 148; and see *Heath* v. *Paget* (1660), 1 Levinz, 2.

[2] See p. 125, *supra*.

[3] *Bro. Abr.*, 'Amerciaments', 50; *Griesley's Case* (1588), 8 Rep. at fo. 39 b; 2 *Inst.*, 27.

[4] See, e. g., Britton, I, xii, 2, 7, 9; xxii, 3–8, 10–19; xxvii, 4; xxxi, 6, 8; III, x, 9; VI, iv, 8; v, 4, 6. And see *Fleta*, II, xxxvi–xxxix; lxvi, 19–21; lxvii, 4.

[5] *Mirror* (Seld. Soc.), 146, 151.

carts than is necessary for the King's use, or accept rewards. If any of the Court does so, he is to be grievously punished by the Marshals; and if it be done out of the court or by one that is not of the court, who shall be thereof convicted, he shall restore treble and be imprisoned for 40 days. The word 'Court' here probably means the King's personal establishment, but the distinction between one that is of the Court (an officer) and one that is not (a stranger), and the provision requiring a conviction in case the offence is committed out of the court, are to be remarked.

By chapter 29 of the same statute, still unrepealed, any Serjeant, Pleader, or other who does any manner of deceit or collusion in the King's Court, and is thereof convicted, shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in the Court, and if the offender is not a pleader he shall be imprisoned for a year and a day at least. And if the trespass require greater punishment it shall be at the King's will. This provision seems to apply to officers as well as strangers. The word 'convicted' (Fr. *atteint*) without qualification proves that the trial is to be in the ordinary course of law.[1] The late Mr. Solly-Flood[2] cites from the records several cases during the reigns of Henry III, Edward I, and Edward II, in which an Attorney was proceeded against by action or information for misconduct, and he is of opinion that at that period, and for long after, there was no power to punish an officer upon a summary proceeding. But, as here submitted, it does not follow that because, in the cases referred to, the procedure was in the ordinary course of law, officers of justice were not punishable summarily for contempts. Solly-Flood also cites a case of 21 Edward III in which an Attorney was punished under the statute without action, information, or indictment. Being present in court and interrogated, the Attorney did not deny the offence, which consisted in appearing for

[1] 'Atteint' when a statute is in French is equivalent to 'convictus' when it is in Latin. See *L. Q. R.*, xxiv, 193, *n.* 3.

[2] *MS. History*, pp. 394, 395, 425, 426; see Preface, *supra*.

the plaintiffs in an action without a warrant, and the offence was proved by the record. The offender was committed to prison for a year and a day and was afterwards to abjure the Court.[1]

This last case proves that there might be a summary proceeding under the statute when the conviction was by record and the defendant was present in court and confessed, and there is evidence that the Court punished its officers summarily for contempt, apart from these conditions. It has been shown[2] that the custom of interrogating the accused was common in Edward III's reign, and it will appear that as early as the previous reign this practice was adopted in the case of an Attorney.[3] It may therefore be concluded as probable that from the time the interrogation of supposed offenders was first practised, and in any case as early as the reign of Edward II, the Court punished its officers for contempt summarily unless it considered that a proceeding by action, information, or indictment was preferable.

Under several other chapters of the Statute of Westminster I, officers of justice are punishable 'at the King's will' or by similar words.[4]

Coke says that offences committed by officers are punishable by amercement by the Justices.[5]

By ordinance of 20 Edward III, c. 6, it is provided that Justices of Assize shall have commissions sufficient to inquire of Sheriffs and other specified officers and also of maintainors, common embraceors and jurors,[6] and of the gifts that they take, and to punish those who are found guilty according as law and reason require. This seems to suggest that the Justices at Westminster had, by common law, jurisdiction to punish such offences summarily. As the separation of the King's Bench from the

[1] *Hugo de Brandeston et Uxor* v. *Walter le Wallsh*, Coram Reg. Roll, M. 21 Edw. III, m. 132.

[2] Page 73, *supra*.

[3] Page 161, *infra*.

[4] See cc. 9, 15, 19, 32.

[5] *Griesley's Case*, *supra*, fo. 40 a.

[6] As to embracery and misconduct of jurors see P. H. Winfield, *History of Conspiracy*, ch. vii.

Council became more complete, it is probable that the Justices exercised more complete control over their officers.

Officers of justice, as distinguished from strangers, when committed for misconduct, were not, from an early date, entitled as of right to obtain their discharge by making fine ; they could only do so if the Court permitted. The offender might be kept in prison for a time sufficient to punish him and then be allowed to make fine. It is clear that he could not claim his discharge until the Council thought fit to grant it, if he were punishable by the Council, and the King's Bench seems to have exercised the same power from the fourteenth century. The result was that the offender might suffer a compulsory fine and imprisonment for the same offence. This could not happen in the case of a stranger, who was entitled to have his fine fixed immediately and, by paying it, to avoid imprisonment.[1]

It has already been shown that a pecuniary penalty assessed upon an officer was properly called an amercement, but if a stranger were guilty of misprision to the Court and would make amends, that which was assessed upon him by the Court was called a fine.[2] The officer's penalty resembled an amercement in that the payment of it was not voluntary to avoid imprisonment, but compulsory ; it differed from an amercement in this, that if the offender failed to pay he was liable to imprisonment, which a person amerced in the strict sense never was. Also, the amercement of an officer was assessed by the Court and an amercement proper by a jury.[3] The amercement of an officer was in fact a fine in the modern sense. A stranger accused of contempt committed out of court had a double advantage over an officer ; he could claim to be tried by a jury, and, if convicted, he could escape imprisonment by a money payment. To-day the stranger is subject to the same conditions as the officer, whether he is charged with contempt in court or out of court.

[1] *Bro. Abr.*, 'Imprisonment', 100.
[2] Page 136, *supra.*
[3] *Griesley's Case* (1588), 8 Rep., 40 a.

In the following instances an officer was allowed to make fine immediately upon conviction. In 1292, a Sheriff, convicted of disobeying the King's mandate, was imprisoned until he made fine.[1] In 1367, upon a bill of deceit, a Sheriff was convicted of embezzling a writ and was committed to prison until he should make fine.[2] In 1433 a Bailiff returned 'ill in prison' one who was afterwards examined and confessed that he was in health. The Bailiff was imprisoned to make fine.[3]

In the following cases the offender was kept in prison by way of punishment before he was allowed to make fine.

In a writ of dower the defendant's Attorney vouched to warrant but issued no writ to summon the warrantor:

Stanton J., to the Attorney: 'Fair friend, have you sued a writ?' *Attorney*: 'Yes, sir.' *Judge*: 'Where is your bill which witnesses it?' *Attorney*: 'Sir, I need no bill for I delivered the writ to my client.' *Judge*: 'What do you want then?' *Attorney*: 'Sir, I pray a *postea*.' *Judge*: 'You wicked rascal, you shall not have it! But because you, to delay the woman from her dower, have vouched and have not sued a writ to summon the warrantor, this Court awards that you go to prison.' *Attorney*: 'I pray that I may find mainprize.' *Judge*: 'We will have no mainprize but stay in goal until you are well chastised.' (*Y. B.* (*Seld. Soc.*), 3 & 4 Edward II, p. 194.)

The committal was clearly summary and the offender, being an officer of justice, was liable to imprisonment at the King's will (see *Mirror*, as cited at p. 157, *supra*).

Solly-Flood's searches[4] were confined, generally, to the proceedings of the King's Bench. The following account from an Exchequer record proves the summary commitment in the year 1310 of Master Henry de Bray, who, there is reason to believe, was an officer of justice. If he was not an officer, the case affords proof of the jurisdiction to commit summarily a stranger guilty of contempt

[1] *Y. B.* (Rolls Series), 20–21 Edward I, 148. Where a Sheriff, Coroner, or other great officer of the King was amerced for a misdemeanour, it was called a 'Royal amercement' (*Y. B.*, 2 Hen. VII, p. 7, pl. 20).

[2] *Y. B.*, *Lib. Ass.*, 41 Edw. III, pl. 12. And see *Hadham's Case* in 1351 (3 Inst. 220).

[3] *Y. B.*, 11 Hen. VI, 42.

[4] See Preface, *supra*.

in facie. Master Henry openly accused Baron de Foxle while sitting in the Court of Exchequer of persuading the Coroner to arrange the panel specially, in a case which the Baron was about to try at the Assizes. The record recites that it is neither convenient nor lawful to challenge the Justices or other officials of the King as to their proceedings in execution of the King's business, and that the words of Master Henry constitute a contempt of the King and the Court. 'After consideration had on the spot on which the words were uttered', it was adjudged that Master Henry should go to prison, and he was committed to the Constable of the Tower at the King's will.[1] Three months later Master Henry acknowledged his offence in full Court, and offered to make amends to the Judge by the payment of £200. The Judge forgave him the payment, and he was discharged on making fine with the King by 100*s.*[2] It will be observed that the practice of the King's Bench not to record the summary punishment of contempts in the face of the Court[3] was not followed by the Court of Exchequer.

In 1343, it was said by Shareshull J. that a Justice of *Nisi Prius* may call jurors under a penalty and may amerce them (*Y. B.* (Rolls Series), 17 Edward III, p. 276).

In 1346 a clerk accused of forging a writ was brought before the King's Bench, sworn, and examined apart by the Justices. The case was adjourned and the defendant was let out on mainprize.[4] No further proceedings against him are recorded.

An Under-Sheriff confessed that he by his servant permitted jurors to go at large, 'and because it appeared of record, viz. his misdemeanour, and he is an officer, a *capias* is awarded against him' (*Y. B.*, 24 Edward III, 24).

In a later case an Attorney made a *capais* of which

[1] Exchequer K. R. Mem. Rolls, 3 Edw. II, rot. 58 (P. R. O.).

[2] *Ibid.*, rot. 58 *d.* As to Master Henry de Bray see Madox, *Exchequer*, i, 232, *n.*; *Cal. Pat. Rolls*, 1281–1301, *passim*; *Sel. Pleas of the Exchcq. of the Jews* (Seld. Soc.), pp. xxxiv, 123, 124; *Henry de Bray's Estate Book*, Camd. Soc., 3rd series, vol. xxvii, pp. xi, xii.

[3] See p. 51, *supra.*

[4] *Y. B.* (Rolls Series), 20 Edw. III, Part ii, Introduction, page 50.

there was no original, and for this, attachment issued against him. He was examined and confessed and was committed to the Fleet, where he remained for a month. He was then put to his fine and swore that he would not meddle further in the law in any court, and his name was struck out of the roll of Attorneys. The Judge told him he might obtain a grant of pardon from the King and return, and that the Bishop could absolve him from his oath.[1]

Some further cases from the Year Books, relating to officers, have been cited in Section 3.[2] In 1626 the Court of King's Bench drew a distinction between its own officer and the officer of another court, refusing to issue an attachment against the latter for contempt of a Court Leet, and advising that an information should be filed.[3]

Serjeant Hawkins, in his *Pleas of the Crown*, deals at length with the procedure by attachment for the punishment of contempts committed by ministers of the Court, and specially in the case of Sheriffs, Attorneys, and Jurors.[4] With regard to other officers of the Court the author says:

> There being scarce anything of this kind to be met with in the books, I shall only observe that it seems clear from the general reason of the law which gives all courts of record a kind of discretionary power in the government of their own officers, that any such court may proceed in such manner [i. e. summarily] against any such officer, not only for refusing to execute its commands or for exercising them irregularly, remissly, or oppressively, but also for all kinds of oppression or injustice done by them in the execution of their offices or by colour of them (Bk. II, ch. xxii, s. 12).

In 1759, Lord Mansfield said of an Under-Sheriff attached for disobedience to a rule of court: 'It is admitted that such a disobedience to the rule of the Court by their own officer is punishable in this summary way'.[5] But by this time it made little difference whether the accused was an officer or a stranger, for the King's Bench had assumed jurisdiction to punish both alike.

[1] *Y. B.*, 20 Hen. VI, p. 37, pl. 6.
[2] See pp. 154–5, *supra*.
[3] *Anon.*, Latch., 198.
[4] Book II, ch. xxii.
[5] *Rex* v. *Beardmore*, 2 Burr., 792.

Section 5. *Lord Coke.*

Sir Edward Coke was Solicitor General from 1592 to 1594, Attorney General from 1594 to 1606, Chief Justice of the Common Pleas from 1606 to 1613, and Chief Justice of the King's Bench from 1613 to 1616. He died in 1634. Long before his time, as we have seen,[1] amercement of parties in the superior courts had become a mere form, but substantial amercement still existed as a pecuniary penalty inflicted on an officer of justice for contempts and irregularities in the performance of his duty.[2] It is proposed to show how the law of fine stood shortly before and after Coke's time, and to discover, if possible, from his writings what views he held on the subject of compulsory fine.

Between the accession of Elizabeth, in 1558, and the death of James I, in 1625, the common law fine for misdemeanour, including contempt, underwent a transformation. For an offer, which the Court was bound to make, to accept a final sum to redeem the offender from imprisonment, was substituted the power to impose a compulsory fine in addition to imprisonment. By Elizabeth's reign the fine had acquired by statute this character of a pecuniary penalty, imposed independently of or in addition to a sentence of imprisonment, in respect of certain offences, of which contempt of court was not one.[3] No doubt the change at common law was gradual, and to some extent the original distinction between fine and amercement had been lost sight of, as Lambarde shows, writing in the year 1581 :

> But of latter time the Justices have in some cases of amerciaments also used to assess and rate the same without any other help, as when

[1] Page 118, *supra*.

[2] See p. 159, *supra*.

[3] See Statute of Westminster I (3 Edward I), c. 13 ; Statute of Westminster II (13 Edward I), c. 12 ; 34 Edward I, stat. 1 ; 2 Henry V, stat. 1, c. 8 ; 17 Edward IV, c. 3 ; 19 Henry VII, c. 13 ; 3 Henry VIII, c. 9 ; 23 Henry VIII, c. 3 ; 27 Henry VIII, c. 14 ; 1 Edward VI, c. 5 ; 2 & 3 Edward VI, c. 1, ss. 1, 2 ; 1 Mar., sess. 2, c. 3, s. 7 ; 1 Elizabeth, c. 2, s. 11 ; 1 Elizabeth, c. 12 ; 5 Elizabeth, c. 4, ss. 13, 21 ; 5 Elizabeth, c. 9, s. 6 ; 5 Elizabeth, c. 15.

the officers of their courts have offended (33 Hen. VI, 54; 34 Hen. VI, 20; Lo.[1] 5, Edw. IV, 5), which also seemeth to make another difference between the two words. But, because neither of these be strictly observed either in common speech or in the understanding of the latter statutes, I will no longer stand upon it (*Eirenarcha*, Bk. IV, c. 16).

meaning apparently, with a play upon the word, that he is unable or unwilling to offer an explanation. If Lambarde was unwilling, perhaps it was because he was not disposed to criticize the action of the higher powers to whom the administration of the law belonged. He seems to recognize the common law distinction between amercement and fine, except in the case of officers.

Though most of the Star Chamber decrees are lost,[2] some particulars have been preserved, and from these it appears that the ordinary forms of punishment in that Court were a pecuniary penalty and committal to the Fleet, or the Tower.[3] Sir Thomas Smith, in his *Commonwealth of England*, says of the sentences of the Star Chamber: 'The punishment most usual is imprisonment, pillory, a fine, and many times both fine and imprisonment.'[4] In most cases of imprisonment the offender obtained his discharge by making fine,[5] but in its latter days the Court fixed the amount of the pecuniary penalty so high that the prisoner was left entirely at its mercy. It is true that the amount accepted was much less than the amount fixed,[6] but the terms of discharge were dictated by the Court. In some cases the sentence was imprisonment for life or perpetual imprisonment;[7] in others, imprisonment during the King's pleasure; in such cases it is clear the offender cannot have had a right to make fine. The Reports prove that the sentence of a pecuniary penalty, with imprisonment

[1] Long Quinto.

[2] Burn, *Star Chamber*, 20, citing a Report of 1723, published by order of the House of Lords.

[3] *Ibid.*, 26–176; Hawarde, *Les Reportes*, ed. Baildon, 10, 19, 40.

[4] Ed. 1589, Bk. III, ch. 4.

[5] Hudson, *Collect. Jurid.*, 224.

[6] Hawarde, *Les Reportes*, ed. Baildon, lxi, lxii.

[7] Burn, *ut supra*, 64, 71, 82, 85, 111, 116, 123, 134. *Leighton's Case*, *How. St. Tr.*, iii, 383; *Prynne's Case*, *ibid.*, iii, 756.

added, was being imposed by the Star Chamber in the latter half of the sixteenth and the early part of the seventeenth centuries,[1] and in adopting this method of punishment, the King's Bench was following the example of the Star Chamber and the statutes, but without any statutory power.

To contrast the old law with the new, it will be convenient to cite two learned authorities who propounded the law at the beginning and end respectively of the period 1558–1625.

The old law is declared by Chief Justice Brooke, who died in 1558, in his *Abridgement*, first published in 1568;[2] and the new law by William Callis in his *Readings on the Statute of Sewers* delivered at Gray's Inn in 1622 and first published in book form in 1647.[3]

In his *Abridgement*, under the title 'Imprisonment', par. 2, Brooke says:

> See under title 'Fines pur contempts', *per totum*, that in every case where a man shall make fine he shall be imprisoned, and he who denies his own deed and it is found against him shall be imprisoned and shall make fine. But if he deny the deed of his ancestor which is found against him he shall but be amerced. 34 Hen. VI, 24.

Under the same title, par. 19, Brooke says:

> A defendant found guilty of forcible entry shall be taken. It seems that in all cases where the defendant shall be imprisoned he shall make fine to the King. 19 Hen. VI, 6, 7 [i.e. *Y. B.*, 19 Hen. VI, p. 6, pl. 13].

[1] *Reg.* v. *Bronkers* (1559), Dyer, fo. 168; *Davison's Case* (1587), How. St. Tr., i, 1229; *Knightley's Case* (1588), *ibid.*, i, 1263; *Countess of Shrewsbury's Case* (1612), *ibid.*, ii, 769; *St. John's Case* (1615), *ibid.*, ii, 899; *Sir John Hollis' Case* (1615), *ibid.*, ii, 1021.

[2] Brooke's *Abridgement* is based on Fitzherbert's, but contains much new matter. It abridges fully the Year Books of Henry VII and Henry VIII (Holdsworth, ii, 545). Brooke is said to contain 20,717 entries (*Harv. Law Rev.*, xxxvii, 240–3). His statements often go beyond the authorities cited. Of Brooke's *Abridgement*, Coke says: 'a worthy and painful work and an excellent repertory or table for the Year-books of the law' (Pref. to 10 Reports).

[3] Callis's work has been commended by Mr. Justice Buller, Lord Kenyon, and Lord Wynford (*Dore* v. *Gray* (1788), 2 Durn. and East, 365; *Blundell* v. *Catterall* (1821), 5 Barn. and Ald., 282).

Callis, referring to the jurisdiction of Commissioners of Sewers, says :

> If one give evil language to Commissioners in Court or disturb the peace there or hinder the business of the Court in a turbulent fashion, he may be by them fined or committed to prison, or both, at the discretion of the Commissioners, for, by 34 Hen. VI, fol. 24, in every case where a man is fined he may be imprisoned and, by 19 Hen. VI, fol. 67,[1] in every case where one is imprisoned he may be fined (Callis, 4th ed., p. 203. See also pp. 171, 176).

The authority under which Commissioners of Sewers derived power to punish obstructions is contained in the form of Commission prescribed by the Act 23 Henry VIII, c. 5 : 'that ye do compel them by distress, fines and amerciaments or by other punishments, ways or means which to you . . . shall seem most expedient'.

It will be observed that for the ancient form 'make fine', Callis uses the modern 'be fined'. Callis purports to quote from the Year Books, but in fact he is quoting Brooke's comments on them, though his quotation is not exact and he has failed to understand Brooke's meaning.

Brooke does not say, nor does he mean, that in every case where a man is fined he may be imprisoned ; he says that where a man shall make fine he shall be imprisoned. According to Callis's rendering of 'fine', this would mean that the double penalty must be exacted in every case where a fine is imposed, and the statement would thus be reduced to an absurdity. But the only object of making fine was to escape imprisonment, and Brooke's meaning is that fine and imprisonment are part of the same process—that a man cannot make fine unless he has received sentence of imprisonment—that he has the right to make fine, not that he is bound to—and that unless he consents to make fine he is liable to imprisonment. First came the sentence of *capiatur* in the judgement, and this was followed by the writ of *capias pro fine*. Actually or notionally the man went to prison and was delivered by making fine. The Court fixed the amount

[1] This should be '6, 7'.

of the fine and the day when the offender must pay it or give security for the payment.[1] Until this day arrived the offender, in most cases, was allowed bail.[2] If he gave security he was allowed bail until the time for payment.[3] If the offender could find the means to pay, it is clear that in most cases he would consent to make fine, but imprisonment was the first step towards the fine and therefore he could not make fine unless he had been sentenced to imprisonment. In this sense Brooke says that where a man shall make fine he shall be imprisoned. No other construction can be gathered from the contents of Brooke's section 'Fine pur contempts' when they have been considered *per totum*.

Callis goes on to say that by 19 Hen. VI, fol. 67,[4] in every case where one is imprisoned he may be fined. Callis again quotes, though inexactly, from Brooke and not from the Year Book. Brooke says 'where the defendant shall be imprisoned he shall make fine'. For the reasons given above, this cannot mean that a double penalty is imposed for a single offence. Brooke himself may be appealed to to confirm this view. Under the title 'Amerciaments' (pars. 17, 56) he says that where a man shall be imprisoned he shall not be amerced, which, so far as concerns the present question, is equivalent to saying that when he shall be imprisoned he shall not be fined in the modern sense, he shall not be sentenced to a pecuniary penalty in addition to imprisonment. In referring to the punishment of trespass *vi et armis* Brooke says in one place, citing Year Book, 19 Henry VI, 8, that the defendant shall always make fine; in another place he says, citing the same passage in the Year Book, that the defendant shall always be imprisoned.[5] These statements would be misleading if the defendant could be fined in the modern sense as well as imprisoned.

[1] *Y. B.*, 37 Hen. VI, 22.
[2] *Ibid.*, 34 Hen. VI, p. 20, pl. 37.
[3] *Ibid.*, 33 Hen. VI, p. 20, pl. 16.
[4] i.e., 6, 7.
[5] *Bro. Abr.*, 'Fine pur contempts', 22; 'Imprisonment,' 20.

Callis again refers to the subject of fine and imprisonment at pp. 208, 209:

But because in Godfrey's case[1] it is said that 'commitment of the body to prison is incident to a fine as by a *capias pro fine* also may be collected', yet I hold it questionable whether the fine shall precede the commitment or the commitment the fine. But, for my own opinion, I hold that this lieth much in the discretion of the Justices and I find cases and precedents both ways. For in *41 Ass.*, plac. 12, an officer was imprisoned *quousque finem fecerit* when the imprisonment preceded the fine, and with this agreeth 7 Hen. VI, fol. 25; and in 33 Hen. VI, fol. 21, one was fined and after imprisoned for it; and there the fine did precede the imprisonment. I take the law to be that if one be fined and this fine may be levied by the Justices, as Justices of the Peace may do,[2] but not Justices of Sewers, then the imprisonment may be *quousque finem fecit* because the fine is leviable by the Justices. But the law is not so of Commissioners of Sewers because they have no power to levy but to estreat the fines into the King's Exchequer. Howsoever, one before them may be both imprisoned and fined, *diversis tamen respectibus*, the one for the wrong done, the other for the contempt or disobedience to the Court.

Callis finds it difficult to reconcile *Godfrey's Case* with his theory of a double punishment. He must have read that case in French, for there was no English edition in 1622, and what he read was this:

Et quant divers defendants sont et ils sont per la ley a faire fine, donques le judgement est '*ideo capiantur*' et ceo est pur le fine, car lemprisonment nest forpris tanqs le fine soit paye; et ove ceo accord 17 Edw. III, 73 *a*, 9 Edw. III, 6; vide 34 Hen. VI, 24, et ceo est le cause que quant lentre est '*ideo capiatur*' que il ne serr' amercie pur ceo que il est a faire fine (*Godfrey's Case*, 11 Rep., 43 *b*).

This was turned into English, but not in Coke's lifetime, in a later edition (1638), when *a faire fine* is translated 'to pay a fine'.

Godfrey's Case was decided in 1614 and the passage quoted shows that Callis had set himself a formidable task. One might expect him to explain the phrase *a faire fine*, but the explanation is wanting. In *Godfrey's*

[1] (1614) 11 Reports, 42 *a*.

[2] Under Statute 14 Richard II, c. 11, the estreat was delivered by the Justices of the Peace to the Sheriff to levy the money.

Case Callis might have discovered the answer to his question whether fine preceded commitment or commitment fine. Coke answers that the judgement is for imprisonment, but that is only for the fine (which the Judges have fixed), and the imprisonment only lasts till the fine is paid. Coke adds that when the entry is that the offender be imprisoned, he shall not be amerced, because he is to make fine. Therefore it cannot be that the offender will suffer a double punishment; he will only be amerced *or* imprisoned, or he will pay a fine. Whenever the judgement is for imprisonment, the right of the offender to make fine attaches, for, as Coke says, 'the imprisonment is only until the fine is paid'. But this does not fit in with Callis's theory of a double punishment and apparently his explanation is that there are two forms of judgement for imprisonment; one is *quousque finem fecerit*, and in that case imprisonment precedes the fine; in other cases the fine precedes the imprisonment, and then there is a double punishment. Callis's opinion is that it lieth much in the discretion of the Justices which form of judgement shall be applied, but this is inconsistent with his further suggestion that when the fine is levied by the Justices, as it is by Justices of the Peace, the judgement may be *quousque finem fecit*, and then the imprisonment is only until the fine is paid, but when the fine is estreated into the Exchequer, as it is by Commissioners of Sewers, the offender may be both imprisoned and fined. Callis grounds his argument on three cases from the Year Books. In the first two[1] the offender was committed to prison until he made fine, and this was the ordinary course. According to Callis, this procedure only applies where the fine is levied by Justices of the Peace, but in both these cases the committal was by a superior court, and therefore the fine was not levied by the Justices but estreated into the Exchequer. In the third case[2] Callis says the man was

[1] *Y. B.*, *Lib. Ass.*, 41 Edw. III, pl. 12; *Y. B.*, 7 Hen. VI, 25.

[2] 33 Hen. VI, 21. In *Y. B.*, 33 Hen. VI, pp. 20, 21 (pl. 16), the question was whether a *capias pro fine* should be awarded against the

fined and after imprisoned. This case has not been traced, but there is a similar one in 33 Henry VI, p. 54, pl. 44, which proves, according to Brooke,[1] that a man who denies his own deed or pleads a false deed shall make fine and be imprisoned. Callis would understand this to imply that a double punishment was imposed, that the man was fined in the modern sense and afterwards imprisoned. Brooke, quoting the case under 'Fine pur contempts', par. 3, says: *il fera fine et serra imprison*, and on referring to the Year Book we find the words are: *il serroit pris pour faire fine.* Whether or not this is the case that Callis refers to, it is destructive of his theory.

That Brooke does not mean that a man shall be fined and afterwards imprisoned so as to involve a double penalty is proved by the fact that in other passages of his book he says that for denying his own deed or pleading a false deed a man shall be imprisoned and shall make fine,[2] thus showing clearly that whichever form of expression is used, the penalty is the same.

There is no difficulty in accounting for the fact that the two phrases are used indiscriminately to describe the same form of punishment. The theory is that the man goes to prison and makes fine to get out; this idea is expressed by 'he shall be imprisoned and shall make fine'. But as a matter of fact a man seldom goes to prison for he is allowed to give security for payment of the fine. This may be expressed by 'he shall make fine and shall be imprisoned', for payment of the fine is the main object to be attained, and if the man fails to pay he must go to prison in execution.

In another passage Brooke says it was determined in Parliament 'Anno 2 M. 1',[3] that the imprisonment almost

defendant and whether he should be allowed mainprize. But the case does not appear to be in point.

[1] *Bro. Abr.*, 'Fine pur contempts', 3.

[2] *Ibid.*, 'Imprisonment', 2, 84; 'Amerciaments', 56; 'Fine pur contempts', 5.

[3] It is doubtful to what this reference applies, but it may be suggested that the Act 1 Mary, sess. 2, c. 9, is intended. See s. 4 of that Act.

in all cases[1] is only for keeping the party until he has made fine, and so, if he offer his fine, he ought to be delivered immediately, and the King cannot justly keep him in prison after the fine tendered.[2] These words were quoted against the Crown in *The Five Knights Case* in 1628.[3] In answer, Heath A.G. says that the case 'appears to be in the ordinary course of judicature fit for Westminster Hall and not for the King's Council-table. A writ of *capias* was the first original of it and therefore not to be applied to the cause of ours'.[4] If the case was fit for Westminster Hall it is remarkable that it should have been passed over in Gray's Inn.

In *Morgan's Case* (1723)[5] it is said that a fine is a ransom from imprisonment, and whenever a Leet may imprison it may assess a fine as a price to redeem the party, and commitment always follows a fine and therefore a *capiatur* lies for finable offences. That a commitment always follows a fine does not mean that they are independent processes, for, as the report says, fine is 'a price to redeem the party'; but after a fine is assessed commitment follows if the fine is not paid. It may be gathered from *Morgan's Case* that the principle of making fine was still recognized as applying in a Court Leet, but Callis's doctrine of imprisonment and fine in the modern sense was acted upon in the superior courts in the eighteenth century.[6]

The result was the same whether in the form of expression imprisonment preceded fine or fine preceded imprisonment. By the ancient practice imprisonment, notionally at any rate, preceded fine; the offender was sentenced to imprisonment and the Court fixed a sum by the payment of which he was entitled to his discharge. By the modern practice where a fine only is imposed, a sum is fixed and the offender is said 'to be fined' in that amount; if he pays the amount he escapes imprisonment. The difference

[1] The punishment of officers is probably the exception referred to. See sect. 4, *supra*. But see also note, p. 201, *infra*.

[2] *Bro. Abr.*, 'Imprisonment', 100. [3] *How. St. Tr.*, iii, 1.

[4] *Ibid.*, 36. [5] 8 Modern, 296.

[6] See *Rex* v. *Beardmore* (1759), 2 Burr., 792; *Rex* v. *Gordon* (1787), How. St. Tr., xxii, 176. *Rex* v. *Flower* (1799), 8 T. R., 314.

between 'to make fine' and 'to be fined' lies in this, that the one is optional and the other compulsory, and that when a man is 'to be fined' he may be sent to prison irrespectively of the fine, whereas if he makes fine he avoids imprisonment. When the King's Bench ordered a man to be fined it was contrary to the rule laid down by Brooke and the Year Books.

Britton makes it clear that by common law the same offence was never punished by amercement as well as imprisonment. Out of all the offences less than felony described by him,[1] only one instance is found in which, apparently, the double penalty is prescribed. This is to be awarded in the case of one who levies a double distress and occurs in Britton, Book I, chapter xxviii, section 26, where he says:

> Whosoever shall be convicted of this offence, damages shall first be awarded to the plaintiff and afterwards the distrainor shall be punished by prison and by fine; or in such cases we will command our Sheriffs that if they find such trespasses to be committed against our peace, they shall speedily inflict such punishments by imprisonment of the bodies of such trespassers and by grievous amercements, that others by their example may be corrected in like cases.

If the corresponding passage in Fleta[2] be referred to it will be seen that two forms of writ in such a case are quoted. The first commands the Sheriff to have the body of the offender before the Justices, to answer. The second, an alternative writ, commands the Sheriff to have the body before himself and before the Keepers of the pleas of the Crown at the next County Court, and, if the offender is found guilty, to chastise him by grievous amercement. A form somewhat similar to the first of these two writs is given in the Register.[3] Fleta follows Bracton, who says nothing about punishing the offender by imprisonment.[4]

The explanation of the above quoted passage from Britton appears to be that the offender might be sent for

[1] See pp. 133, 152, *supra*.
[2] *Fleta*, II, xlvii, 35–7.
[3] *Reg. Brev.* (*Jud.*), fo. 70.
[4] *De Legibus*, fo. 159 *a*.

trial either before the King's Justices, in which case, if found guilty, he would be punished by imprisonment with a right to make fine, or, in the County Court, in which case he would be punished by amercement.

The author of the *Mirror of Justices* complains that the articles upon the third chapter of the Statute of Merton[1] for the punishment of re-disseisors are contrary to the Great Charter because they prescribe a double punishment for one offence.[2] He says:

> The law wills that every one attainted of a personal trespass be punished by a corporal punishment if he cannot ransom it with money. And what is said of this statute is to be understood of all statutes after the first making of the Great Charter in the time of Henry III, for it is not law that any one should be punished for a single deed by imprisonment or any other corporal punishment and, in addition, by a pecuniary punishment or ransom; for ransom is nothing else than the redemption of a corporal punishment (*Mirror*, Seld. Soc., 182).

Brooke says clearly that a man shall not be imprisoned and amerced, or make fine and be amerced, for the same offence (*Bro. Abr.*, 'Amerciaments', pars. 17, 56, citing *Y.B.*, 11 Henry IV, 55).

In *Selden's Case* (1629)[3] Littleton argues on Selden's behalf that contempts are only trespasses 'punishable only by fine or imprisonment or by both, but not until conviction'. The nature of the punishment is only incidental to the argument; the main point is that there must be a conviction before punishment. By the year 1629 the practice of inflicting a double punishment has been established and Littleton is not arguing that this is lawful. His words, if correctly reported, are open to the construction: 'Contempts are punishable only by fine or imprisonment or (according to the practice now established) by both.' Elsewhere Littleton refers to the punishments as separate: 'But I will lay as a ground of my following argument that as offences are of two natures, capital or

[1] (1235) 20 Hen. III.
[2] And see Bracton, *De Legibus*, fo. 236 *a*.
[3] *How. St. Tr.*, iii, 267.

as trespasses, so they are punished in two manners, to wit, capitally or by fine or imprisonment'.[1]

In 1630 *Jeffes* was indicted for a libel on Sir Edward Coke and the Court of King's Bench, and because he put in a scandalous plea and refused to plead otherwise, he was imprisoned until he made his submission to the Court and was fined £1,000.[2] In 1633 *Sir William Waller* was indicted and found guilty of an assault in the Palace of Westminster near the great hall. He was sentenced to a fine of £1,000 and imprisonment during the King's pleasure.[3] In 1638, Harrison was convicted on indictment of accusing Mr. Justice Hutton of high treason in open court, and was sentenced to be fined £5,000 and to be imprisoned during the King's pleasure.[4] It is difficult to see how the sentences in these three cases could be justified on a trial at common law. The common law rule that no man (officers may be excepted) ought to be twice punished for the same offence applied, apart from statute, in every case and to the whole kingdom outside the walls of the Star Chamber. Even in the case of officers there seems to have been a doubt; in the *Prior of Montague's Case*[5] it was said by Cotesmore (afterwards Chief Justice of the Common Pleas) that 'if a Juror at the bar will not swear, you shall assess upon him a fine or put him in prison at your election'. Blackstone speaks of the punishment of offences at common law 'by fine or imprisonment'.[6] Emlyn, who wrote a preface to the *State Trials* in 1730, in pointing out defects in our legal system, remarks with regard to the smaller crimes and misdemeanours that the punishment is left to the prudence and discretion of the Judge who may punish them 'either with fine or imprisonment', citing *Beecher's Case* (1609).[7] Emlyn does not contemplate the existence of a power to fine and imprison for the same offence.

Apparently, Callis derives the notion that Commis-

[1] *Ibid.*, 253.
[2] *Jeffes's Case*, Cro. Car., 175.
[3] *Waller's Case*, Cro. Car., 373.
[4] *Harrison's Case*, Cro. Car., 503.
[5] *Y. B.*, 7 Hen. VI, 12.
[6] *Com.* IV, 378.
[7] 8 Rep. 59*b*; Emlyn's preface in the *State Trials*, folio ed., p. xi.

sioners of Sewers can imprison and fine separately for the same offence from a misreading of Brooke and the Year Books. He cites no authority beyond his own opinion for saying the reason is that fines are not levied by the Commissioners but estreated by them into the Exchequer, nor for suggesting that imprisonment is for the wrong done and fine for the contempt or disobedience to the Court.

A passage in Lambarde's *Eirenarcha* must be mentioned because, at first sight, it supports Callis's theory of a double punishment. Speaking of 'confession',[1] Lambarde says:

> In the free and open (or absolute) confession he taketh the fault upon him and yieldeth himself simply to such pain as the court will inflict for it, and this free confession is of great force in the law . . . [there is also] confession 'after a manner', as when he putteth himself *in gratiam regis et petit admitti per finem.* Query, whether the Justices be compellable to admit such confession 'by a manner', being altogether devised in favour of offenders and for deceiving the King, or whether they may drive the party either to an absolute confession (for increase of the fine) or to his traverse, that (failing therein) he may be imprisoned and fined also.

If the last words are to be read as meaning that the Justices may lawfully impose a double punishment, it must be pointed out that the statement is opposed to the weight of authority already cited from the Year Books, to which Lambarde must give way. Still, it may be said that whatever the ancient law was, the statement proves that in 1581, when Lambarde wrote, the practice of imposing a double punishment had been established. I venture to submit that this was not the case and that the words may be read literally and strictly in the sense in which Brooke speaks when he lays it down that a man shall be imprisoned and shall make fine.[2] That Lambarde's views on fine and imprisonment agree with Brooke's, and not with Callis's, may be proved by reference to his observations in *Eirenarcha*, Book IV, chapter 16:

> When the conviction is for trespasses against the peace, riots and such other contempts and offences against the Commission or statutes, for the

[1] Book IV, c. 9.

[2] See p. 167, *supra*.

which no certain fine is appointed, the judgement is that the party shall be taken to satisfy the King for his fine and thereupon the *capias pro fine* and, if the party cannot be found, other judicial process goeth out till he be outlawed. . . . But if the party be brought in, he is a prisoner and then are the Justices of the Peace by their discretion to assess the fine and to estreat it and to deliver him. The imprisonment that I speak of is only to the end that the King may have the fine and therefore upon the payment thereof or upon pledges by recognizance to pay it, the offender ought to be delivered (2 Mar.;[1] *Bro. Abr.*, 'Imprisonment', par. 100).

Hereof also the fine took first his name, of the Latin *finis*, because it maketh an end with the King for the imprisonment laid upon the offence committed against his law. And in that respect chiefly doth it differ from an amerciament; for when the offender hath not so deeply trespassed that thereby it deserveth any bodily punishment at all, as if he be non-suit in an action or do commit any such like fault, he is said to fall into the King's mercy because he is therein mercifully to be dealt with. . . . But when the offence or contempt falleth out to be so great that it asketh the imprisonment of the body itself, and that during the King's will and pleasure, then is the party to redeem his liberty with some portion of money as he can best agree with the King or his Justices for the same; which composition is properly called his fine or his ransom, and in Latin *redemptio*, as may be plainly seen by the Stat. Marl., 52 Henry III, cap. 1, 2, 3, 4; and by the Statute called 'Rageman' and divers other ancient statutes; it seemeth by the property of the word '*redemptio*' that the party offender ought first to be imprisoned and then to be delivered or ransomed in consideration of his fine.

It can hardly be doubted that Lambarde's views on fine and amercement accorded with the ancient practice and that he would not have sanctioned the modern innovation of a double punishment.

It is submitted, upon the above evidence, that towards the latter end of the sixteenth century, or in the early years of the seventeenth, the 'making fine for contempt' was disappearing and that the Court of King's Bench was adopting the practice, laid down by Callis for the guidance of Commissioners of Sewers, of fining in the modern sense and imprisoning, also, for a single offence.

The next question is, what were Coke's views on the subject of fine?

[1] 2 Mary; see note, p. 171, *supra*.

The expression 'were fined' appears in Dyer's reports, first published in 1585, and is applied to officers of justice. Jurors drank before delivering their verdict, *et pur ceo ils fueront fyne quilibet* XL *d.*[1] It is believed that this is the earliest instance of the use of the verb 'to fine' in its modern sense in relation to a case at common law. Coke owned the manuscript of Dyer's reports and frequently refers to them,[2] and, as we shall see, often makes use of the modern phrases 'to fine' and 'to be fined', to the exclusion of the older expression 'to make fine'. In the index to Dyer's reports (edition of 1672) '*ils fueront fine*' is applied to officers of justice and '*fra fine*' to a stranger.

Down to the middle of the sixteenth century the Courts spoke of 'making fine', and Coke acknowledges the right of an offender to make fine, in several places. In *Griesley's Case* (1588)[3] he says:

> And *finis dicitur quia finem litibus imponit* and is not traversable, as it is held in 7 Hen. VI, 13 a,[4] *i.e.*, the party redeems his offence for a sum of money which makes an end of it and of his imprisonment for it, and for that reason it is called also 'redemption', as appears in the Judicial Register, 31, *ad satisfaciendum nobis de redemptione sua pro quadam transgressione*, &c. (fo. 41 a).

And again in *Beecher's Case* (1609):[5]

> In all actions *quare vi et armis* or *rescous*, trespass *vi et armis*, &c.; if judgement be given against the defendant he shall be fined (Fr. ed., *serra fine*)[6] and be imprisoned, for to every fine imprisonment is incident; and always when the judgement is *quod defendens capiatur*, it is as much as to say *quod capiatur quousque finem fecerit* (fo. 59 b).

The French version of a passage in *Godfrey's Case*

[1] Dyer, ed. 1585, fo. 37 b. So far as is known to the writer, the only copy of this edition is in the possession of the Law Society.

[2] *Wallace on the Reporters*, 126 ff.

[3] 8 Rep., 38 a. The eighth part of Coke's Reports was published in 1611.

[4] *Y. B.*, 7 Hen. VI, p. 12, pl. 17.

[5] 8 Rep., 58 a.

[6] The original edition of Coke's Reports was in law-French; the English translation appeared after his death.

(1614)[1] has been quoted at p. 169, *supra*. The English version is given here:

> And when there are divers defendants and they are by law to pay a fine (Fr. ed., *a faire fine*), then the judgement is *ideo capiantur*, and that is for the fine, for the imprisonment is but till the fine is paid; and therewith agree 17 Edw. III, 73 a, 9 Edw. III, 6; *vide* 34 Hen. VI, 24. And that is the reason, when the entry is *ideo capiatur*, that he shall not be amerced because he is to pay a fine (*a faire fine*) (fo. 43 b).

Again, in the first part of his *Institutes*, published in 1628, Coke says:

> Fine, *finis*. Here 'fine' signifieth a pecuniarie punishment for an offence or a contempt committed against the King, and regularly to it imprisonment appertaineth. And it is called *finis* because it is an end for that offence. And in this case a man is said *facere finem de transgressione etc. cum rege*, to make an end or fine with the King for such a transgression . . . And to an amerciament imprisonment belongeth not, as it doth to a fine or ransome . . . And aptly a redemption and a fine is taken to be all one; for by the payment of the fine he redeemeth himself from imprisonment that attendeth the fine, and then there is an end of the businesse (fos. 126 b, 127 a).

In these four passages Coke clearly acknowledges the existence of a right to make fine, and in the case *De libellis famosis* (1605)[2] the same learned Judge says that a libeller may be punished 'by fine or imprisonment'. This is an admission that fine is an alternative and not an addition to imprisonment.

Dr. Bonham's Case, before the Common Pleas when Coke was Chief Justice there, should be referred to because he is there reported to have said that no man can be punished by fine and also by imprisonment for the same offence. The case is reported by Coke as *Dr. Bonham's Case* and by Brownlow as *Bonham* v. *Atkins*.[3] In Brownlow Coke is quoted as saying, with reference to the statutory power to punish offences by 'fines, amerce-

[1] 11 Rep., 42 a; reported as *Bullen* v. *Godfrey* in 1 Rolle, 73. The eleventh part of Coke's Reports was published in 1615.

[2] 5 Rep., 125.

[3] (1609) 8 Rep., 114 a; 2nd Brownlow, 255.

ments and imprisonment', conferred on the Censors of the College of Physicians:[1] 'The Physicians of the College could not punish any by fine and also by imprisonment, for no man ought to be twice punished for one offence.'[2] As it stands, this is a clear statement of the old common law rule, but looking at Coke's report of the case, it does not appear that this is what he said.

There were two clauses in the Charter giving the Censors of the College disciplinary powers. The first authorized them to impose a penalty of £5 on any physician who practised in London for more than a month without licence from the College; the second authorized the Censors to punish a physician who practised ill, according to the quantity of his fault, by fines, amercements, and imprisonment. Dr. Bonham was ordered by the Censors to pay a fine of £5 for practising in London for more than a month without licence. He was summoned for refusing to pay the fine, and, because he still refused and stated his intention of continuing to practise, the Censors ordered him to be imprisoned for seven days. The doctor brought this action for false imprisonment.

According to his own report, Coke said that the plaintiff could not be punished under both clauses, which would involve the absurdity 'that one should be punished not only twice but many times for one and the same offence . . . and the law saith: *Nemo debet bis puniri pro uno delicto*.'[3] In this account Coke does not commit himself to the general proposition that an offence cannot be punished by fine and also by imprisonment, but only says that the Censors cannot punish a single offence under both clauses of the Charter.

At the end of his report (fo. 120 b) Coke gives advice to the College of Physicians as to the exercise of their disciplinary powers, and we should have expected him to tell them, if such was his opinion, that they must in no

[1] Stat. 14 & 15 Hen. VIII, c. 5, confirming the Charter of incorporation of the College.

[2] 2nd Brownlow, 265.

[3] 8 Rep., 118 b.

case punish an offence by a compulsory fine as well as imprisonment, but he does not do so. On the contrary, he says: 'The cause for which they impose fine and imprisonment ought to be certain'.[1]

In one respect Coke clearly departs from ancient usage. He persistently discards the expression 'to make fine', which in Latin, French, or English had been used from the twelfth century downwards and perpetuated on the face of it the voluntary nature of the process. Coke substitutes for this the new phrases—new, as regards common law offences—'to fine', 'to be fined', 'to impose a fine'. This is general throughout the reports of *Griesley's Case*, *Beecher's Case*, and *Godfrey's Case*, if the passage from *Godfrey's Case* quoted at p. 179, *supra*, be excepted. Coke does not explain the innovation, which he carries so far that, in quoting the language of authorities containing the old phraseology, he changes it into the new. Thus, in his *Second Institute*,[2] Coke quotes the Writ *De militibus* of 1 Edward II, which requires those who seek to escape the burden of knighthood 'to make fine'. In discussing this writ Coke raises the question how often an offender 'may be fined', and he answers that the man can by law 'be fined' but once, for otherwise he might be 'fined' infinitely.[3] In support of this contention Coke cites a number of instances from the Parliament Rolls, the Year Books, Fitzherbert's *Natura Brevium*, Dyer's *Reports*, and Brooke's *Abridgement*, each of which, when examined, shows that the expression made use of is 'to make fine'. Coke does not explain his alteration of the phrase.

In *Griesley's Case*, *supra*, the powers of the Steward of a Leet to punish contempt in Court were in question, and in the language of Coke's report, in the English edition:

> Resolved per *totam curiam* that if any contempt or disturbance to the court be committed in any court of record the Judges may set [Fr. ed., *impose*] upon the offender a reasonable fine (fo. 38 b).

[1] 8 Rep., 120 b.

[2] Page 593. The *Second Institute* was completed in 1628; see the Preface to the *First Institute*.

[3] 2 Inst., 597.

The verb 'imposer' is Coke's choice and 'to set' is not a literal translation. The compulsory element in the imposition of a fine by the Court may be contrasted with the voluntary offer on the part of the offender to make fine.

Farther on, Coke says that if a tithingman refuses to make a presentment in a Leet the Steward shall set [*imposera*] a reasonable fine upon him, 'as it is held in 10 Hen. VI, 7 a.' The words of the Year Book are: *il peut agard' eux al prison e puis assesser ū fiñ sur luy selon sa discretion, sans ēe asseisir en aut̃.* In *Griesley's Case* it is said that if one of the jurors in a Leet departs without giving his verdict, he shall be fined (*serra fine*) by the Steward (fo. 38 b). '*Serra fine*', like '*imposera*', excludes the notion of a voluntary act. You do not find these terms in the Year Books.

Evidence of Coke's assertion of the power to 'impose' a fine may be gathered from another passage in the second part of his *Institutes*. With reference to the words of the Statute of Westminster I, c. 4, '*et rent al volunt le roy*', Coke says: 'that is, to be fined at the King's will'.[1] The literal translation of '*rent*' is '*ransomed*'. 'To be ransomed at the King's will' implies an option to make fine with a large sum of money; 'to be fined' involves compulsion.

In Rolle's report of *Godfrey's Case*,[2] Coke, who was the presiding Judge, is made to say: 'What is the difference between a fine and amercement? For denying deeds, for force and contempts, fines are but amercement.' Rolle is an accurate reporter and is not likely to have written down what Coke did not say. The passage is not in Coke's own report of the case,[3] but the definition of fines as being 'but amercement' in cases of contempt agrees well with Coke's practice of turning 'make fine' into 'being fined'. Having omitted the statement from

[1] 2 Inst., 168; see also p. 210.

[2] *Bullen* v. *Godfrey*, 1 Rolle, 74.

[3] 11 Rep., 42 a. For Coke's method of reporting see Veeder in *Select Essays in Anglo-Amer. Legal Hist.*, ii, 131.

his report, Coke cannot be under the imputation of having asserted this to be law, but on the authority of Rolle we may be justified in assuming that the statement was made.[1] If the assumption is correct, it confirms the belief that Coke was in favour of ignoring the distinction between allowing a man to make fine to escape imprisonment and ordering him to be fined and imprisoned as well.

These are the circumstances which suggest that Coke held views on the subject of fine not sanctioned by ancient usage.

The question whether the King's Bench had power to impose a compulsory fine with imprisonment for a common law offence does not seem to have come before Coke for decision, and it cannot be asserted, therefore, that he took an official part in promoting the change of practice which had been established to the satisfaction of Callis in 1622.

Bearing in mind that in the sixteenth century, both under statute in certain cases and in the Star Chamber, and, as regards contempts committed by officers of justice, in the King's Bench, misdemeanours were punishable by compulsory fine and imprisonment, the extension of this practice in the King's Bench to contempts committed by parties and strangers was a simple step, but one involving a large addition to the powers of the Court.

At the beginning of the seventeenth century the King's Bench appears to have been drifting into the position of claiming to punish contempt by the double penalty. It seems that Coke made no attempt to stem the current, but rather encouraged it. It is difficult on any other supposition to account for his disinclination to speak of 'making fine' and for the doctrine which Callis preached to the students of Gray's Inn. It may be suggested that Callis was following in Coke's footsteps and came to the conclusion that the courts of common law had power to

[1] For Sir Matthew Hale's opinion of Rolle's learning and ability see the preface to Rolle's *Abridgement*.

inflict the double penalty. Coke paved the way for Callis by refraining from protest against the double penalty and by discarding the old phrase 'to make fine'. This phrase carried its meaning on its face, viz. that the offender thereby made an end of his punishment; but when it came to be said that a man was 'to be fined' there was nothing to point to the previous connexion between fine and imprisonment. During the seventeenth century the common law courts assumed a power, not based on the common law, which has been exercised down to the nineteenth century [1] and has not been questioned since.

The principle of making fine under a *capiatur* in an action survived the making fine for other forms of contempt; probably the reason was that the *capiatur* came to be little more than a form. In 11 Charles I, in an action of battery against a man and his wife, the wife was alone found guilty and the judgement was *quod capiantur* against both, 'because the husband is party to the action and ought to pay the wife's fine'.[2] There was no distinction in principle between the two descriptions of fine—fine under a *capiatur*, and fine for what, for the sake of distinction, may be called 'special' contempt. Coke includes them both in the same class: 'For denying deeds, for force and contempts, fines are but amercement',[3] and Callis cites the *capiatur* cases from the Year Books, Brooke and Coke, in support of his theory that there was power to punish contempt by the double penalty.

The course of procedure was as follows: The judgement of *capiatur* was followed by the writ of *capias pro fine*, under which the Sheriff brought into Court a party to an action held liable to imprisonment, who made fine or in default was committed to the Marshal, if in the King's

[1] *Skipworth's Case* (1873), L.R. 9 Q.B., 219; *Reg.* v. *de Souza*, *Times*, Dec. 3, 1888, p. 3; *Re Bahama Islands* (1893), A.C., 138; and see Lord Selborne's speech on introducing the Contempt of Court Bill, 1883, referred to at pp. 44 ff., *supra*.

[2] *Roll. Abr.*, tit. 'Amercement', p. 221, citing *Mayow* v. *Cockshott*, Pasc. 11 Car. B.R.

[3] Page 182, *supra*.

Bench, and to the Warden of the Fleet, if in the Common Pleas or Exchequer. If an officer of justice offended, being presumed to be always present in Court, no *capias* was necessary, and he was committed forthwith upon proof of his offence, and the same procedure applied if the offender were a stranger who was found guilty of contempt in the actual view of the Court.

In confirmation of Lambarde's suggestion that confusion existed between the expressions 'amercement' and 'fine', it can be shown that, whereas the punishment of an officer in the superior courts was called an amercement and that of a stranger a fine, in the Leet a stranger was punished by amercement and an officer by fine.

In the Year Book of 5 Edward IV, as we have seen,[1] it is said that the penalty assessed on a minister of the Court is properly called an amercement, and that which is assessed upon a stranger is called a fine. In his *Compleate Copyholder* (1630),[2] Coke lays it down that in a Court Leet offences committed out of Court by private persons are punished by amercement affeered by the homage, and that the offences of private persons committed in Court, as well as all offences committed by officers, whether out of Court or in Court, are punished by fine at the discretion of the Steward.

Coke points out that the Steward has more certain notice of offences committed in Court by any persons whatsoever, and can better judge and discern the nature and quality of offences committed out of Court by officers than jurors can, and therefore that *Magna Carta* left the punishment of those offences to the discretion of the Steward. In support of this contention Coke says: 'Yet the intent of the statute makers was not to make the jurors affeerors "*in omnibus delictis mulctandis sed in iis tantummodo puniendis quorum certam possint habere notitiam et intelligentiam*", as Fleta speaketh (Lib. I, cap. 98)'.[3] *Fleta* expounds the words of the charter in Book I, chap. 48, s. 2, which seems to be the passage to which

[1] See p. 136, *supra*. [2] Sect. xxvi.
[3] There are only 48 chapters in Liber I.

Coke intends to refer: '*Liber homo non amercietur . . . secus si per dominos suos, nec apprecientur quantitates amerciamentorum nisi per sacramentum parium suorum, videlicet proborum et legalium hominum de visneto, qui facultatum suarum notitiam habeant pleniorem.*' Fleta speaks here of the jurors having fuller knowledge of the means of those to be amerced; Coke quotes him as saying that jurors are to affeer only in those cases of which they may have certain knowledge and intelligence (generally).

In explaining the difference between fine and amercement in Leets and other inferior courts, Coke says: 'Whosever is fined may lawfully be imprisoned, but whosoever is amercied, cannot'.[1] Brooke C.J. tells us that, so far as his jurisdiction extends, the Steward of a Leet has equal power with the Justices,[2] but if Coke is right, the Steward has no power to fine or imprison a stranger unless for contempt in the face of the Court; he can only amerce him, and whosoever is amerced cannot be imprisoned.[3] According to Coke, offences committed by private persons [i. e. strangers] are punished in the Leet by amercement, and offences committed by officers are punished by fine. Fine and amercement in a Leet had acquired a meaning exactly the opposite to that which was applied to them in the superior courts.

One more point in which Lord Coke is concerned remains to be considered.

We have seen[4] that Henry II's *Assize of the Forest* speaks of fine and ransom 'at the King's will' and in the *Dialogue of the Exchequer* a similar phrase is applied to amercement. When judgement is given against a man's movables at the King's pleasure (*in beneplacito regis*), the sentence is pronounced against him by the Judges in these words: 'He is in the King's mercy for his money';[5] if a Sheriff take money due to himself from the debtor, he shall be punished pecuniarily at the King's pleasure.[6]

[1] *Compleate Copyholder*, s. xxvi.
[2] *Bro. Abr.*, 'Leet', 14, citing *Y. B.*, 7 Hen. VI, 12.
[3] See p. 174, *supra*.
[4] Page 137, *supra*.
[5] *Dialogue* II, xvi.
[6] *Ibid.*, II, xvii.

'At the King's pleasure' and 'at the King's will' are obviously equivalent terms. Glanville says that where both parties fail to appear they are proceeded against at the will of the King or his Justices for contempt of court or false claim.[1] The defendant is punished for contempt in not appearing when summoned and the plaintiff for failing to establish his claim. Bracton says that those who make an erasure in a writ, whether the Chancellor himself or another, as the clerk of a Justice or of the Sheriff at the procurement of any party, are in mercy and at the King's will;[2] and that a Sheriff who neglects to execute an attachment or return a writ is to be amerced for his contempt at the King's will.[3] An officer is not entitled to have his amercement affeered. In defining the limits of the royal prerogative Fleta uses the expression '*de voluntate regis*', pointing out that the King's will is limited by what has been laid down according to principle and right under his authority with the advice of his magnates.[4] Britton distinguishes between the degrees of offence in allowing a prisoner to escape. In an ordinary case the gaoler is to be amerced at 100*s.* in the Eyre of the Justices; but if the escaped prisoner was an approver, the gaoler is to be ransomed 'at our will'.[5] At a later date we find those who fail to obey a Bailiff's summons to attend an inquest are liable to be amerced at the Bailiff's will and not by their peers.[6] Coke says, quoting statutes, '*sub forisfactura omnium quae in potestate sua obtinet*, or to be at the King's will, body, lands and goods, and the like, these are not extended to the loss of life and member, but to imprisonment, lands and goods'.[7] Several instances of punishment 'at the King's will' appear in the Appendix, *infra*.[8]

[1] Glanville, I, 33.
[2] *De Legibus*, fo. 413 b; and see *Britton*, II, xvii, 2, and *Fleta*, IV, x, 14.
[3] *De Legibus*, fo. 441 b.
[4] *Fleta*, I, xvii, 7.
[5] *Britton*, I, xii, 2.
[6] A. D. 1486. *Borough Customs* (Seld. Soc.), I, 265; and see *ibid.*, p. 241.
[7] Co. Litt., fo. 391 a.
[8] See the cases numbered (7), (11), (14), (22), (29), (45), (55), (56), (62), (70).

The phrases to be ransomed, punished or imprisoned, 'at the King's will' or 'pleasure', are found in several early statutes.[1]

'At the King's will' may mean either 'by the King's Justices' or 'by the King in his Council'. Coke has no doubt that the words 'at the King's will' give the power to the Justices. Commenting on the Statute of Westminster I, c. 4, he says:

Et rent al volunt le roy; that is, be fined at the King's will, which is to be understood that the King's Justices, before whom the party is attainted, shall set the fine. *Et non dominus rex per se in camera sua, nec aliter coram se nisi per justiciarios suos: et haec est voluntas regis viz. per justiciarios et legem suam, unum est dicere* (2 Inst., 168).

Coke is quoting from the Year Book Mich. 2 Richard III, 11, where it is reported that the King had summoned all the Judges to the inner Star Chamber and had put to them three questions. The third related to the fraudulent alteration of a name all through the course of an action. Down to outlawry the process in the case had been at Westminster, but the *Exigi facias* issued in the Court of Husting. Five persons were charged with the offence, including the plaintiff, his attorney, the Keeper of the Writs, and the Clerk of the Counter of London. The Judges advised that the offence was felony, under the statute 8 Henry VI, c. 12, but as it was committed partly in Westminster and partly in London there was doubt of the jurisdiction to convict of felony and the offenders were indicted of misprision only, and, being convicted of this offence, were committed to prison. All the Justices met in the church of St. Andrew, Holborn, to consider in what way those who had been convicted should make fine:

And they all agreed that in all cases in which any one was convicted of misprision, trespass &c. where he was to make fine and redemption, the Justices before whom he was convicted &c. should take security and pledge for the fine &c. and afterwards assess the fine at their discretion, and not the King himself in his Chamber nor otherwise

[1] See Stat. West. I, cc. 4, 9, 13, 15, 19, 20, 25, 26, 29, 30, 32; Stat. West. II, cc. 34, 39, 49; 20 Edw. I, st. 3; 28 Edw. I, cc. 2, 20.

before him except through his Justices. *Et haec est voluntas Regis, viz., per justiciarios suos et legem suam unum est dicere* (Year Book, 2 Richard III, 11).

Rasure of a writ was an offence punishable by common law at the King's will,[1] and this being so, though the last sentence of the report, of which the Latin text is quoted above, is not free from ambiguity, the sense probably is that in the opinion of the Justices 'the King's will' means the will of his Justices, and therefore the Justices must assess the fine in the case submitted to them. That this is the correct construction is confirmed by the fact that had the offence not been one punishable at the King's will the Justices would have assessed the fine as a matter of course and there would have been no question to propose to them. But it is submitted that the power so assumed by the Justices did not enable them to inflict a punishment otherwise than in accordance with the rules of the common law; they could assess the fine and keep the offender in prison until it was paid, but they could not exercise the power possessed by the Council of imposing a compulsory fine and imprisonment as well.

The opinion of all the Judges was entitled to great weight, but it was not a decision and the Judges do not appear to have heard any arguments, and certainly they gave no reasons. However, the opinion is the foundation of the law of the subject and is adopted by Stanford, Fitzherbert, Lambarde, Coke, Hale, and Blackstone.[2]

In treating the subject historically it may be permissible to offer some critical remarks on this opinion of the Judges, because it may have weighed with those who were responsible for introducing the compulsory fine in the common law courts. It was arguable, from the point of view of those who wished to extend the jurisdiction

[1] Bracton, *De legibus*, fo. 413 b; see p. 187, *supra*, and see statutes 8 Ric. II, c. 4, 8 Hen. VI, c. 12.

[2] Stanford, *Pleas of the Crown*, fo. 37 E; Fitzherbert, *Office of Justices of the Peace*, 106; Lambarde, *Eirenarcha*, iv, 16; Coke, *Second Inst.*, 168; Hale, *P. C.*, i, 375; *Blackst. Com.*, iv, 121.

of the King's Bench, that the exercise of the King's will included the power to punish by compulsory fine and imprisonment.

We can see from Britton that many offences were by common law punishable at the King's will[1] and many others were so punishable by statute. If the expression 'at the King's will' did not distinguish the cases in which punishment was to be fixed by the Council from those in which the Justices were to fix it, the words were mere surplusage and might as well have been omitted in all cases; it was immaterial whether the punishment was to be at the King's will or not—in either case it was to be awarded by the Justices and not by the Council. If it be said that the Justices had a freer hand in administering the punishment when it was to be at the King's will, the answer is that there is no authority for making such a distinction and no authority defining what the distinction was. Where it was intended by a statute that the fine should be fixed by the Justices and not by the Council, the statute said so, as in that of 7 Henry V: 'by imprisonment, fine and ransom, by the discretion of the said Justices'. This cannot be the same thing as when the statute says 'at the King's will'. If 'at the King's will' meant 'at the will of the Justices' it would follow that defaults of Justices were punishable by their brother Justices. Britton says Justices are punishable at the King's will,[2] but he says also, with regard to their trespasses, that no judgement is to be given without the King's order,[3] i.e. the order of the King in his Council.

Fleta says, where a writ is lost or destroyed [and rasure implies destruction]: 'It follows that by this very fact the Judge's jurisdiction will come to an end, as if from the failure of his warrant . . . and whosoever shall be convicted of malicious withdrawal of this kind shall be committed to the custody of a prison, there to remain until he is able to obtain the King's favour by sentence, ransom or other method' (*Fleta*, IV, x, 14).

[1] See p. 152, *supra*.
[2] Britton, I, xxvii, 14.
[3] *Ibid.*, I, xxii, 13.

Stanford, in his *Pleas of the Crown* (1557),[1] notes that in all cases where a statute says that a man shall be imprisoned at the King's will, he cannot be discharged or admitted to mainprize until the King declare his will concerning him; and there are, he says, divers other offences constituted upon this by common law and statute, not being treason or felony, in which a man is not mainpernable. Stanford cites Year Book, 24 Edward III, p. 33, pl. 25, where a man who went armed in the palace was ordered into the custody of the Marshal and was refused mainprize until the King had declared his will. This offence was punishable under the statute 2 Edward III, c. 3, by imprisonment 'at the King's will'. In another passage Stanford speaks of the cases in which a man is not replevisable at common law, and, amongst them, of those where the man is taken by commandment of the King. He says: 'When at the commandment of the King, it is understood of the commandment of his own mouth, or of his Council which is incorporate with him: and, they say, "with the mouth of the King himself", for, otherwise, if you should take these words of commandment generally, you could say that every *capias* in a personal action is the King's commandment, for it is *Praecipimus tibi quod capias*; and yet the defendant in such case is replevisable by the common law' (fo. 72, E). If imprisonment at the King's will means that the King is to signify his will by his Council, it is difficult to see why he is not to signify his will in the same manner when an offender is to make fine at the King's will.

According to Fitzherbert, where a statute says that an offender shall make fine at the King's will, it is to be understood that the Justices shall assess the fine.[2] No authority is cited, but a reference is given to the heading 'Mainprize' (fo. 101 b), where it is said that an offender imprisoned at the King's will cannot be discharged or let to mainprize until the King has signified his will (citing Stanford, fo. 77, and Year Book, 34 Edw. III, 33).[3]

[1] Fo. 77, B. [2] Fitzh., *Office of Justices of the Peace*, fo. 106 b.
[3] The correct reference is probably 24 Edw. III, p. 33, pl. 25.

Fitzherbert makes no remark on the discordance between these statements.

The forms 'at the King's pleasure' and 'by the King's special commandment' are both found in the 39th chapter of the Statute of Westminster II.[1] The Sheriff is to punish the resisters of his Bailiffs by imprisonment, 'from whence they shall not be delivered without the King's special commandment' (s. 23). The names of those who resist the Sheriff himself are to be certified to the Court, and upon conviction they are to be punished at the King's pleasure (*secundum quod domino regi placuerit*); 'neither shall any officer of the King's meddle in assigning the punishment, for our Lord the King hath reserved it specially to himself' (ss. 24, 25). Whether or not these two forms of punishment were distinguishable, there can be no doubt that the sentence on those who were to be punished at the King's pleasure under this statute was pronounced by the King in his Council and not by the Justices. Chief Baron Gilbert treats *sine speciali precepto* in this statute as equivalent to 'during pleasure'.[2]

In the Year Book 18 Henry VIII, p. 1, pl. 1, the case turned on the eighth chapter of the Statute of Marlborough,[3] providing that an offender 'shall not be delivered without the special commandment of our Lord the King'. The Court held, Englefield J. dissenting, that the offender should agree to make his fine in the Chancery and should be released from prison by writ from thence, for the special command of the King could not be but out of the Chancery. [For this purpose the Chancery acted as the administrative branch of the Council.]

Lambarde thus asserts the jurisdiction of the Judges as against the Council: 'Again if it be finable by these or such like words, "at the King's will" or "at the King's pleasure" (as you shall find it in many statutes), there also the same Justices (before whom the conviction was) shall assess the fines at their wills and pleasures. For

[1] 13 Edw. I, st. 1. [2] See p. 11, *supra*. [3] 52 Hen. III.

(say the Books 2 Ric. III, 11 and 18 Hen. VIII, 1) the King in all such cases uttereth his own will and pleasure by the mouths of the Justices'.[1] It will be seen that Lambarde cites the Year Book of 18 Henry VIII, 1, quoted above, as authority for his proposition, but he can have read only the judgement of Englefield J., for the rest of the Court were of the contrary opinion. Coke is constrained to give a qualified admission that where the statute provides that the discharge can only be by special command of the King, the writ must be out of the Chancery and the fine must be assessed there. Coke's words are: 'as some have said (18 Hen. VIII, 1)'.[2]

In modern times Harcourt has expressed the opinion that amercements '*ad voluntatem regis*' were treated as being subject to taxation by the King, and by 'the King' was meant the King in Council or Parliament.[3]

Earlier in the same year in which the Judges delivered their opinion to Richard III, the Lord Chancellor, on the opening of that King's first Parliament, had pronounced a panegyric on the Council which seemed to ignore the existence of the King's Courts of common law as an element of the Constitution, and claimed for the Council a jurisdiction over 'contemptes and abusions of the laws' which left out of account the fact that these offences were triable as misprisions or misdemeanours at common law. The following is an extract from the Lord Chancellor's speech:[4]

What ys the bely or where ys the wombe of thys grete publick body of Englande but that and there where the Kyng ys him self, hys Court[5] and his Counselle? . . . Thidir be brought alle maters of weight, peax and were with outwarde londes, confederacions, ligues and alliances, receivynge and sendynge of embassades and messages, brakynge of treux, pryses in the see, routes and riottes and unlawfulle assemblees, oppres-

[1] *Eirenarcha*, Bk. IV, c. 16.
[2] *Second Inst.*, 115.
[3] *English Historical Review*, xxii, 737.
[4] *Camden Society*, vol. 60, pp. lx, lxi.
[5] i. e. the High Court of Parliament, which he was addressing. Cf. 'Thys hyghe court of parliament' (p. xlix) and 'Thys hyghe and grete courte at thys time, that ys to saye, the lordes spiritualle, the lordes temporalle and the commens' (p. lix).

sions, extorsions, contemptes and abusions of the lawe, and many moo surfittes than can be well nombred.

Dr. Baldwin has shown how the Council, after a period of depression, was now asserting itself once more,[1] and the Judges seem to have taken the opportunity, on being asked for their opinion, of expressing it so as to assert their independence of the Council.

The 'innovations' alleged against Coke, including the charge of unduly exalting the King's bench at the expense of the Star Chamber,[2] considered in connexion with the foregoing relation of facts, lend probability to the suggestion that Coke was willing to borrow from the Star Chamber for use in the King's Bench the practice of punishing misdemeanours by compulsory fine and imprisonment. The ground of complaint against Coke is found in *Bagg's Case*,[3] decided by the King's Bench in 1615, when Coke was Chief Justice:

Resolved that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings but other errors and misdemeanours extra-judicial, tending to the breach of peace or oppression of the subjects or to the raising of faction, controversy or debate, or to any manner of mis-government; so that no wrong or injury, either public or private, can be done but that it shall be here reformed or punished by due course of law (11 Rep., fo. 98 a).

This was nothing less than an assumption by the King's Bench of the jurisdiction exercised by the Star Chamber, and upon the removal of Coke from the office of Chief Justice this judgement was particularly referred to. In *The Lord Chancellor Egerton's Observations on the Lord Coke's Reports*[4] it is said that the Chief Justice, 'giving excess of authority to the King's Bench, doth as much as insinuate that this Court is all-sufficient in itself to manage the State; for if the King's Bench may reform any manner of mis-government (as the words are), it seemeth that there is little or no use either of the King's royal care and authority exercised in his person and by his proclamations,

[1] *The King's Council*, ch. xvi.
[2] Spedding, *Letters and Life of Bacon*, vi, 90.
[3] 11 Rep., 93 b. [4] Brit. Mus., 694, M. 4 (10).

ordinances, and immediate directions, nor of the Council Table which under the King is the chief Watch-tower for all points of government, nor of the Star Chamber which hath ever been esteemed the highest court for extinguishment of all ryots and public disorders and enormities' (p. 11). Coke's answer was that if the resolution in *Bagg's Case* were limited to faction or misgovernment 'by inferior magistrates', the objection would be removed (Bacon's *Works*, ed. Montagu, vii, 376–7).

Coke was also accused of promoting innovations in the practice of the Star Chamber. The following memorandum by 'E. Umfreville'[1] appears on a manuscript of Hudson's *Treatise on the Star Chamber*:

'He [Hudson] greatly exclaims against innovations and innovators among whom (in many places of the work) he reckons Sir Edward Coke during the time of his potency and when he was Attorney General; and upon whom he boldly lays these early innovations which from his example afterwards increased and swelled so greatly to the prejudice of public liberty and property.'[2]

Whether or not Hudson expressed the views attributed to him,[3] it is probable that Coke did help to extend the jurisdiction of the Star Chamber. Hawarde remarks on the exercise of a prerogative jurisdiction by the Council and the Judges in 1597, so that the decrees and proclamations of the Court should have the force of common law or an Act of Parliament.[4] At this time Egerton was Lord Keeper, Coke was Attorney General, and Bacon was acting with Coke as Counsel for the Queen.

The power to inflict a compulsory fine, with imprison-

[1] There were three persons named Edward Umfreville, father, son, and grandson. The first, a barrister, died in 1691; the second, an officer of the Exchequer, died in 1739; the third, a barrister, died in 1786 (*The Umfrevilles, their Ancestors and Descendants*, p. 41).

[2] Lansdowne MS. 622, quoted by Miss Cora L. Scofield in her *Study of the Court of Star Chamber*, p. vi.

[3] There are some references to Coke in the printed copy of Hudson's Treatise; see *Collect. Jurid.*, ii, 100, 103, 217.

[4] *A. G.* v. *Parker*, Hawarde's *Les reportes in Camera Stellata*, ed. Baildon, 78.

ment added, for a misdemeanour at common law supplanted what was in fact a power to inflict only a money penalty and imprisonment in default of payment, without leaving evidence by a judicial decision of the exact time at which the change took place. Callis speaks confidently of the wider power being already established in 1622 when he gave his Readings at Gray's Inn, for though he was arguing upon the words of a statute, his argument applies equally to a common law offence. If Callis had been able to cite a recent decision he would doubtless have done so, but he relies on cases in the Year Books, which, it has been submitted here, do not establish his proposition. Coke, when he had a suitable opportunity of giving advice to the College of Physicians on the subject, avoided the point.[1] It can hardly be doubted that the change crept in gradually, and so long as the Star Chamber existed it mattered less what the rule at common law was. With the abolition of that Court and the assumption of its jurisdiction by the King's Bench, the wider power became firmly established in the latter Court. That there were sometimes searchings of heart when the question afterwards arose, may be presumed from the case of *Groenvelt* v. *Burwell*, decided by the King's Bench in 1699.[2] The plaintiff brought an action for false imprisonment against the Censors of the College of Physicians. The defendants pleaded their jurisdiction under letters patent and statute to fine and imprison. The plaintiff took exception to the plea that the defendants had exceeded their jurisdiction by imposing a fine and imprisonment, for though they might have committed the plaintiff in execution for the fine, they could not impose both a fine and imprisonment as a punishment. Holt C. J., in delivering the judgement of the Court, says: 'As to the second objection that they have fined the plaintiff and imprisoned him also, it is answered by the words of the letters patent which give power to do it; and so do the Justices in many cases at common law' (p. 472).

[1] See pp. 180–1, *supra*.

[2] 1 Lord Raym., 469.

Chief Justice Holt cites no authority for the power at common law, but confines himself to the statement that it is exercised.

Section 6. *The Eighteenth Century and after.*

The provision in the Bill of Rights [1] that excessive fines shall not be *imposed*, appears not to extend the common law power to punish a misdemeanour. If, as I have contended, the common law only authorized a sentence of imprisonment with the option of a fine, the effect of the Bill of Rights is to direct the Court to be reasonable in assessing the amount of the fine. By the use of the word 'imposed' the statute may seem to sanction the novelty, apparently promoted by Coke, of substituting 'to fine' or 'to impose a fine' for 'to make fine', but it cannot be supposed that the intention was, by the mere use of this word, to give statutory authority to the claim of the courts to impose a compulsory fine if that practice was not allowed by the common law. If my assumption is incorrect, it will not affect the present argument, which is, that though the modern practice is now firmly established as law, that law is founded on an innovation.

Neither Hawkins nor Blackstone calls attention to the change of phrase from 'make fine' to 'be fined', nor to the assumption by the common law courts of a power to inflict a compulsory fine with imprisonment in the place of the optional fine to avoid imprisonment.

Hawkins sees a difficulty in sanctioning the double penalty and is evidently puzzled to find authority. He only tells us that as it has been held that the Steward of a Leet may commit for an affray in Court and afterwards impose a fine at his discretion, it follows *a fortiori* that superior courts of record have the like power.[2] Hawkins follows the example set by Coke in his use of the expression 'imposing a fine' and evidently means that the Steward of a Leet may impose the double penalty. It is strange that the best authority Hawkins can find for

[1] 1 William and Mary, sess. 2, c. 2.

[2] Hawkins, *P. C.*, II, i, 15. But see *Morgan's Case*, cited at p. 172, *supra*.

superior courts of record exercising the same power is that a Court Leet can do so. If he had meant that the Steward of a Leet can cause an offender to make fine, he could have cited better authority from Brooke's *Abridgement* and the Year Books for superior courts having a like power.

In the first few editions of his *Commentaries* Blackstone says that in early times the superior courts in imposing fines imitated the practice of amercement used in the Court Leet and Court Baron.[1] The author omits this statement in the latest edition for which he was responsible,[2] and makes no other attempt to account for the origin of the power exercised by the superior courts. He says:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Charta*, c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right, '*Liber homo non amercietur*', &c. . . . Amercements imposed by the superior courts on their own officers and ministers were affeered by the Judges themselves, but when a pecuniary[3] mulct was inflicted by them on a stranger (not being party to any suit) it was then denominated a *fine*; and the ancient practice was, when any such fine was imposed, to inquire by a jury '*quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum*'. And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment or a limited imprisonment instead of such fine as might amount to imprisonment for life (*Blackst. Com.*, 9th ed., iv, 379, 380).

This passage, reproduced by Serjeant Stephen in his edition of the Commentaries,[4] is partly derived from Gilbert's *Exchequer Practice* (c. 5), but seems to be based on a mistaken view of the earlier authorities. Gilbert, in turn, cites Madox's *History of the Exchequer*. Madox quotes a single instance of an inquest to atterminate a debt due to the King—that is, to fix a period for payment when the debtor was unable to pay the whole amount at

[1] *Blackst. Com.*, 1st ed. (1765–9), iv, 373. [2] 9th ed. (1783).
[3] Some editions have 'peculiar'.
[4] It is omitted in the latest issue (1925), edited by Professor Jenks.

once—but this was a case of amercement and not of fine.[1] It is believed that no instance can be produced of an inquest to atterminate a fine or to support Blackstone's statement that it was the ancient practice to inquire by a jury (in effect) how much the debtor could afford to pay —in fact to affeer the fine as an amercement was affeered. Fines could be atterminated in the Exchequer, as appears by instances quoted by Madox,[2] but the amount of the fine was fixed by the Court in which the action was pending, and though it could be mitigated by that Court in the same term in which it was assessed, the amount could not be altered afterwards.[3] The clause in *Magna Carta* cited by Blackstone, '*Liber homo non amercietur*', &c., had nothing to do with fines and related only to amercements.[4] Blackstone seems to imply that a fine was nothing more than an amercement inflicted on a stranger, ignoring the true distinction between fine and amercement and the connexion between fine and imprisonment pointed out by Coke.[5] Blackstone goes on to suggest that after the supposed disuse of affeerment of a fine, the Court used to assess a more moderate fine and made up the deficiency by committing the offender to prison; hence, if Blackstone is rightly understood, the origin of the double punishment of a pecuniary penalty and imprisonment. It is submitted that Blackstone's views on fine and amercement cannot be sustained.

It may be that some local courts had assumed a power to impose a compulsory fine and imprisonment for a single offence before that practice was adopted in the superior courts. In the records of the borough of Devizes in 1560 we fined an order 'that no Typler sell any Ale within the Borough after Wensday next above a penny for one ale quart, upon paine to every of them that do the contrary to forfeit every tyme iiij d. and suffer one

[1] Madox, *Excheq.* (ed. 1769), ii, 208.
[2] Madox, *ut supra.*
[3] *Bac. Abr.*, 'Fines and amercements', F.
[4] *Griesley's Case* (1588), 8 Rep., 39 b.
[5] *Co. Litt.*, 126 b, 127 a; *Griesley's Case*, 8 Rep., 41 a; *Godfrey's Case*, 11 Rep., 43 b.

day's imprisonment';[1] though, as we have seen,[2] the principle of 'making fine' in a Court Leet was recognized as existing in 1723.

Comparing the punishment of criminal contempts at common law before the seventeenth century with the penalty imposed in and since that century, we find that by the old law the punishment was nominally imprisonment, from which the prisoner was entitled to be discharged on payment of a fine, and the Court could not detain him in prison after payment and was bound to fix the amount without delay. From the seventeenth century, downwards, the punishment has been much less favourable to the offender: viz. imprisonment for a period, unlimited except by the discretion of the Court; and, in substitution for or in addition to imprisonment, a compulsory fine at the discretion of the Court, for which the offender is liable to be imprisoned as long as it is unpaid. So the law remains at the present day. By way of illustration, I may refer again to a modern case[3] where the respondent was sentenced to three months' imprisonment and to pay a fine of £500 for contempt in speaking abusively of a Judge. Applying the existing rules, if the respondent paid the fine he still had to undergo three months' imprisonment, and at the end of the three months, if the fine was not paid, he had to serve an unlimited period of imprisonment until payment, unless he was pardoned by the Crown. In a more recent case[4] the sentence was in substance, though not in terms, a reversion to the ancient practice. The offender was ordered to pay a fine of £100 and to be imprisoned until that amount and a further sum of £20 for costs were paid. This was exactly equivalent to imprisoning the offender and allowing him to make fine with £120.

Though the opinion has been expressed by some persons that the power of the Court to punish criminal

[1] *Some Annals of the Borough of Devizes, 1555–1791*, edited by B. H. Cunnington, p. 47.

[2] Page 172, *supra*.

[3] *Re Skipworth* (1873), L.R., 9 Q.B., 219.

[4] *Reg.* v. *Gray*, [1900] 2 Q.B., 36.

contempt should be limited, no complaint has been made, even by the most fault-finding upholder of the common law, that the power has been exercised with undue severity in recent years. Whether or not these happy conditions will always exist, the other side of the question must also be considered. The power to punish being 'practically arbitrary and unlimited',[1] the Court may be inclined to treat an offence too leniently, when a heavier sentence would have been rightly imposed if the power of the Court had been limited.

Note.—It is possible that the passage from Brooke's *Abridgement* ('Imprisonment', 100), referred to at p. 156 and p. 172, notes, has a more limited application than would appear from the quotation in the text. Brooke says that for contempt against the King, as in the case of a corody and the like, the offender shall be imprisoned; and then he goes on to say that it was held in Parliament that imprisonment, almost in all cases, is only to detain the offender until he has made fine, &c. I think, however, that the words 'almost in all cases' must be understood to apply generally to contempts punishable by common law (see p. 166). A form of contempt, not referred to above, is within the exception indicated by Brooke, viz. striking a person in court or drawing a sword on the Judge, the punishment for which is still, by common law, imprisonment of the offender for life, forfeiture of his goods and of the profits of his lands during life, and the cutting off of his right hand (Hawkins, *P. C.*, I, vi, 3). In this case the judgement involves a pecuniary penalty with imprisonment added. In 1799 some ingenuity was exercised to relieve the Court from the necessity of pronouncing sentence of amputation (*Rex* v. *Earl of Thanet*, *How. St. Tr.*, xxvii, 821).

[1] The words of Jessel M.R. in *Re Clements* (1877) 6 L.J. Ch. at p. 383.

IX

ALMON'S CASE IN THE UNITED STATES

THE impeachment of Judge Peck in 1831, referred to in Chapter III,[1] has had a remarkable and far-reaching effect on the law of contempt in the United States. *Almon's Case* was introduced in the arguments on the impeachment and was elaborately discussed by the learned Counsel on both sides. A full transcript of the proceedings was published by Arthur J. Stansbury under the title, *Report of the Trial of James H. Peck*, Boston, 1833.

Judge Peck was impeached before the Senate of the United States of the charge that while sitting as a Judge of a District Court he had caused an attachment for contempt to issue against L. E. Lawless, an Attorney and Counsellor practising in his Court, and had summarily sentenced him to twenty-four hours' imprisonment and ordered him to be suspended from practising as an Attorney or Counsellor in that Court for eighteen months. The contempt consisted in publishing in a newspaper a letter which the Judge held to be a libel on himself in his judicial capacity.

To meet the argument of the Managers of the impeachment that the courts of the United States have no cognizance of crimes and offences at common law, it was said by Mr. Meredith and Mr. Wirt for the respondent that the power to punish contempt summarily is not derived from the common law but is inherent in the courts as a necessary part of their institution and existence. This proposition is not disputed by some of the Managers, who claim, however, that in the United States the power does not extend to the punishment of libels on the Court,

[1] Page 42.

whatever the law of England may be, and that the power only exists so long as the proceedings to which it relates are actually pending. Mr. Storrs, one of the Managers, does not admit that the power is inherent. He says:

> Libel on the court was doubtless a crime in the early stages of the judicial history of England, the origin of which cannot now be exactly fixed, and punished by summary process beyond the date of any known records of the law. It is safer to take it as a crime within the limits which we find assigned to it by law, than to go back to first principles for the purpose of establishing that as a crime, by deduction, which the law has not specifically made so. It is not to be made an offence on arguments drawn from necessity, unless the law has made it so. Power is ever silently stealing its way along that path. It is first necessary—then inherent—then implied—then expedient—then adopted—then demonstrated on precedent as well as principle—and finally established and learnedly and eloquently vindicated (Stansbury's *Report*, p. 402).

Mr. Storrs said well. He accepted the position that in England the law was as laid down in the opinion of an English Chief Justice, but he would not allow that the power which that law was said to confer could be upheld on the ground of necessity.

It is submitted that the attempt on behalf of the respondent to draw a distinction between common law and law inherent by necessity failed to establish any difference between them, material for the purposes of the argument. There can be no question that some powers are inherent in courts; power to insist on the provision of a roof to keep out the weather and suitable furniture and the required officers, and power to preserve order by causing a disturber of the proceedings to be removed from the Court, are self-evidently inherent powers; these are necessaries without which the Court cannot do its work. The existence of other less obviously inherent powers can only be established by an appeal to the common law, and then, although they may be inherent, they are common law powers. An illustration may be found in Mr. Meredith's speech for the defence at p. 330 of the report, where he quotes from Lord Ellenborough's

judgement in *Burdett* v. *Abbot* (1811).[1] That learned Chief Justice remarks, with reference to the power of the Houses of Parliament to punish a libel on themselves:

> The privileges which belong to them seem at all times to have been, and necessarily must be, inherent in them independent of any precedent. . . . Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempt which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law of less dignity undoubtedly than itself? (14 East, 137, 138).

In this passage the Chief Justice effectually declares the common law to be that libels on courts are punishable summarily as contempts, and he could not declare it more emphatically by any form of words, for he treats the proposition as beyond all doubt or question. Now, English 'common law' is 'case law'.[2] In the present instance we must go to case law to establish the fact that the power to punish libel on the Court, summarily, is inherent in the Court (reserving the question whether in the particular instance the common law was correctly laid down). Therefore, if the power be inherent, it is so only by virtue of the common law; we may call it inherent, but it is a common law power.

Almon's Case is the principal authority relied on in the defence to the impeachment to prove the existence of a right to punish a libel on the Court by attachment. Mr. Meredith, quoting Mr. Justice Wilmot's written judgement at length, contends that 'it is quite impossible to read this opinion without being compelled by the strength of its arguments to assent to all the conclusions which it establishes' (p. 346). Again he says: 'The opinion, then, Mr. President, thus entitled from the well-merited fame of its author, but much more from the invincible strength of its own reasoning, to the most respectful consideration, is a direct authority to prove

[1] 14 East, 1.

[2] F. W. Maitland, *Encyc. Brit.*, 10th ed., xxviii, 249, art. 'English Law'.

that a libellous misrepresentation of the opinion or proceeding of a court of justice is a contempt of the highest, because of the most dangerous character' (p. 349).

That *Almon's Case* is an authority is denied by the Managers of the impeachment. Mr. Buchanan, the Chief Manager, a distinguished member of the Bar and afterwards President of the United States, argues that the power to punish the offence of scandalizing a Court is a Star Chamber power, and that *Almon's Case* is no case at all, but an opinion of Mr. Justice Wilmot which was never delivered in Court (p. 430).

Mr. Storrs said 'that he had examined this point more at large as it stood in England at common law, because if the jurisdiction in question did not exist there, the whole superstructure which the respondent's counsel had raised up on the contrary assumption, fell to the ground. But if it was admitted for the sake of argument that the cases would have borne out the extreme position that disrespectful or general defamatory words of those who held commissions as judges constituted the offence of contempt punishable summarily there at common law, it availed the respondent nothing until it was further shown that such was the Federal law here—the *lex terrae* of the Federal Government' (p. 404).

The relation between the common law of England and that of the United States has been illuminated by the recent opinion of the Supreme Court delivered by Mr. Chief Justice Taft in the case of *Ex parte Grossman* (1925).[1] In that case the petitioner had been committed by a District Court for contempt by breach of an injunction under circumstances which were held to make his action criminal. The petitioner, who had been released upon the grant of a pardon by the President of the United States, was recommitted by the District Court, notwithstanding the pardon, and now prayed for his discharge by a writ of *Habeas Corpus*. The Constitution gives the President 'power to grant reprieves and pardons for offences against the United States except in

[1] 267 U.S., 87.

cases of impeachment'. It was argued that the word 'offences' did not include common law offences, but only extended to those created by legislative act. In the opinion of the Court:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. . The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the thirteen States were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. They were familiar with other forms of Government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood. . . .

The King of England, before our revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanours, and as he has down to the present day. . . .

These cases [cited] show that long before our Constitution a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the Court and the King in the public interest, and its inefficacy to halt or interfere with the remedial part of the Court's order necessary to secure the rights of the injured suitor. . . . The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law. . . . In our own law the same distinction clearly appears. . . . For civil contempts the punishment is remedial and for the benefit of the complainant and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the Court and to deter other like derelictions. . . .

Nor is there any substance in the contention that there is any substantial difference in this matter between the executive power of pardon in our Government and the King's prerogative. The courts of Great Britain were called the King's Courts, as indeed they were; but for years before our Constitution they were as independent of the King's interference as they are to-day. The extent of the King's pardon was clearly circumscribed by law and the British Constitution, as the cases cited

above show. The framers of our Constitution had in mind no necessity for curtailing this feature of the King's prerogative in transplanting it into the American governmental structures, save by excepting cases of impeachment; and, even in that regard, as already pointed out, the common law forbade the pleading a pardon in bar to an impeachment.

The pardon granted by the President was therefore held to be effective and the petitioner was discharged.

It may be that if the doctrine of *Almon's Case* was part of the common law of England when the American Constitution was established, it became the common law of the United States and part of the 'judicial power' which Congress was authorized to confer upon the Courts,[1] but it is very doubtful whether at the date of the Constitution that doctrine did form part of the common law adopted by the United States. Mr. Justice Wilmot's undelivered judgement lay concealed until the year 1802, and, so far as is known, was not cited in an English Court until the hearing of *Burdett* v. *Abbot* in 1811.[2] It was first cited with approval from the Bench in 1821,[3] and was not therefore adopted as the common law of England until after the establishment of the American Constitution.

In Judge Peck's case the bodily infirmity of the respondent probably induced the majority of the Senate to deal mercifully with him[4] and he was acquitted by twenty-two votes to twenty-one. The effect of this resolution was to uphold the doctrine that a libel on the Court is punishable summarily by attachment. In the course of his speech Mr. Buchanan had said: 'I will venture to predict that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power and Mr. Lawless has been its last victim' (p. 430).

Mr. Buchanan lost no time in his attempt to counteract the effect of the Senate's decision. The acquittal was pronounced on January 31st, 1831. On the following day the House of Representatives referred it to the Judiciary

[1] *Harv. Law Rev.*, xxxvii, 1016.
[2] See p. 27, *supra*.
[3] *Rex* v. *Clement*, 4 Barn and Ald., 218.
[4] *Harv. Law Rev.*, xxxvii, 1025.

Committee, of which Mr. Buchanan was the head, to inquire as to the expediency of defining by statute offences punishable as contempts, and limiting the punishment. A Bill was prepared, brought in by Mr. Buchanan on behalf of the Committee, debated, carried through the House of Representatives and the Senate, and passed into law by March 2nd following.[1] These are the terms of the Act:

(Sect. 1.) Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions and the disobedience or resistance of any officer of the said courts, party, juror, witness or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts. (Sect. 2.) And be it further enacted That if any person or persons shall corruptly or by threats or force, endeavour to influence, intimidate or impede any juror, witness or officer in any court of the United States, in the discharge of his duty, or shall corruptly or by threats or force, obstruct or impede or endeavour to obstruct or impede the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor by indictment and shall on conviction thereof be punished by fine not exceeding five hundred dollars or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence.

Mr. Buchanan had not the means of ascertaining whether Mr. Justice Wilmot's declaration of the common law was well founded, but the learned Counsel had arrived at a conclusion which, if the view here submitted be the right one, was in general accordance with the common law of England, and the substance of his conclusion was embodied in the Act of 1831. The purpose of the Act was (1) to prevent misbehaviour in the presence of the Court or so near thereto as to obstruct the administration of justice: (2) to preserve discipline amongst the officers of the

[1] Frankfurter and Landis in *Harvard Law Rev.*, xxxvii, 1026–7.

Court: (3) to enforce obedience to the process and orders of the Court; and to declare that the power of the Court to exercise a summary jurisdiction in contempt extended to the cases so specified and no other. Contempts out of Court were to be prosecuted by indictment.

With this Act should be read the Judiciary Act of Congress of 1789, section 17 of which gave to the courts of the United States power to punish by fine or imprisonment, at the discretion of the courts, all contempts of authority in any cause or hearing before them.

It is doubtful whether these Acts apply to the Supreme Court of the United States;[1] they clearly apply to inferior Federal courts;[2] they do not apply to the several State courts, each of which is subject to the Constitution of its own State, though in many of the States Acts were passed in terms similar to those of the Act of Congress of 1831.[3]

It is not surprising that the practice should vary with regard to a matter which concerns not only the Constitution, the Legislature, and the Judicature of the United States as a whole, but also the same elements in each of the forty-eight States. In each the same questions arise: What is contempt of court, and what is the form of procedure to punish it? Are these matters regulated by the Constitution? Has the Legislature power to regulate them? What are the powers of the Courts to deal with them? Throughout, there is an echo from the past, What of Wilmot's doctrine?

The answers to these questions vary according to circumstances and as opinions differ. It will be sufficient to cite instances in which the subject has been debated in the Courts and the decisions arrived at.

Professor Frankfurter and Mr. James M. Landis have shown how the Act of 1831 was received by the Courts:[4] 'The powerful legislative influence generated by Peck's trial did not exhaust itself in Congress. . . . The lower

[1] See *Ex parte Robinson* (1873), 19 Wallace, U.S., 505. [2] *Ibid.*

[3] Frankfurter and Landis in *Harvard Law Rev.*, xxxvii, 1027–8; J. L. Thomas, *Law of Constructive Contempt*, St. Louis (1904), 32.

[4] *Harvard Law Rev.*, xxxvii, 1027 ff.

Federal Courts, having lived through this history and felt the statute in its setting, at once respected the restrictions which it imposed' (*Ex parte Poulson*, 15 Fed. Cas., No. 11,350, at p. 1205 (1835); *United States* v. *Holmes*, 26 Fed. Cas., No. 15,383, at pp. 360, 363 (1842)).

Chancellor Kent had no doubt about the Act of 1831 being constitutional and binding on the Courts, though he disapproved of it. Referring to the subject he says: 'The Act of Congress, however, reaches and prohibits all interference by attachment and summary punishment for contempt committed out of the presence of the Court, by libels upon the Court and the parties and pending causes: and it is a very considerable, if not injudicious, abridgement of the immemorially exercised discretion of the Courts in respect to contempts' (Kent, *Commentaries*, 3rd ed., i, 300, *n.*).

The Chancellor followed in the steps of Wilmot and Blackstone. Had he lived on, he would have seen it laid down that a libel on the Court is punishable summarily, not, as he supposed, because contempts out of court were so punishable by immemorial usage, but on the ground that it is a contempt committed so near to the court as to obstruct the administration of justice. This reason is not to be found in Wilmot or Blackstone, nor in any authority before them. With regard to this point, the following cases will serve to show how the Act of 1831 has been construed on different occasions by the Supreme Court of the United States.

In *Ex parte Robinson* (1873)[1] a District Court of the United States (an inferior Federal Court) had summarily, upon attachment, made an order disbarring Robinson, a member of the Bar, on the charge of contempt in having induced a witness to evade service of process. The Supreme Court ordered Robinson to be reinstated, holding that the power of the District Court was governed by the Acts of 1789 and 1831 and that Court had therefore no jurisdiction to make the order.

It was said by Mr. Justice Field in delivering the

[1] 19 Wallace, U. S., 505.

opinion of the Court (Mr. Justice Miller dissenting) that the moment the Courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of the power to punish for contempt;

> But the power has been limited and defined by the Act of Congress of March 2, 1831. The Act, in terms, applies to all Courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. . . . As thus seen, the power of these Courts in the punishment of contempts can only be exercised to ensure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgements, and processes. . . .
>
> The law happily prescribes the punishment which the Court can impose for contempts. The 17th section of the Judiciary Act 1789 declares that the Courts shall have power to punish contempts of their authority in any cause or hearing before them by fine or imprisonment at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised and must be held to be a negation of all other modes of punishment.

In *Toledo Newspaper Company* v. *United States* (1918),[1] libellous newspaper comments on pending proceedings in a Federal Court were adjudged by the Supreme Court to be a contempt punishable by summary process, and the decision was based on the provision of the Act of 1831, that the power to punish summarily for contempts shall not be construed to extend to any cases except 'the misbehaviour of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice'. That provision of the Act, it was held, 'conferred no power not already granted and imposed no limitations not already existing' (p. 418). The Act, it is said,

> recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammelled and unprejudiced exercise of the judicial power given by

[1] 247 U. S., 402.

summarily treating such acts as a contempt and punishing accordingly (p. 419).

It is urged that, although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily paper having large circulation, as it was not shown that they had been seen by the presiding Judge or had been circulated in the Court-room, they did and could form no basis for an inference of guilt, but the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject (p. 421).

In a dissenting judgement Mr. Justice Holmes says: 'When the words of the statute are read it seems to me that the limit is too plain to be construed away. . . . I think that "so near as to obstruct" means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact and the word "misbehaviour" strengthens the construction I adopt. "Misbehaviour" means something more than adverse comment or disrespect' (p. 423).

Mr. Justice Holmes agrees with the summary enforcement of obedience to decrees, but when there is no immediate need for action he considers that contempts are like any other breach of the law and should be dealt with as the law deals with other illegal acts. Mr. Justice Brandeis concurred in this opinion (p. 425).

Messrs. Frankfurter and Landis have argued that the decision of the majority of the Court in this case is founded on a misreading of the history of *Judge Peck's Case* and the Act of 1831; they have also pointed out that the comparison made by the Court of that Act with the Pennsylvania Act of 1809, which is said to have been its model, is based on an inadequate quotation from the Act of 1831. The same learned writers, commenting on the effect of the decision, remark that 'Stimulated by the *Toledo Newspaper Company Case*, some of the lower Federal Courts, wholly unmindful of the history of the Act of 1831, in effect have written this Act off the statute-books' (*Harvard Law Review*, xxxvii, 1029–38).[1]

[1] Reference is made to *United States* v. *Craig*, 279 Fed., 900 (S.D.N.Y.

By an Act of Congress of 1914, known as the Clayton Act, it is provided by sections 21–25 that wilful disobedience to any process or order of any District Court of the United States or any Court of the District of Columbia, if involving a statutory criminal offence, shall be proceeded against as for a contempt. The trial to be by the Court, or, upon the demand of the accused, by a jury. The penalty is a maximum fine of one thousand dollars and imprisonment for not exceeding six months. Nothing in the Act is to be construed to relate to contempts committed in the presence of the Court or so near thereto as to obstruct the administration of justice, nor to contempts in disobedience to process or order in actions brought by the United States, but these and all other contempts not comprised in the Act may be punished in conformity to the usages then prevailing. This Act was passed to secure to the accused, in cases where an act of contempt is also a crime, the right to be tried by a jury, for, in the absence of such a provision, he might be deprived of the right on the ground that the offence, being a contempt, was punishable by attachment. Messrs. Frankfurter and Landis have discussed the provisions of this Act with special reference to injunctions granted in industrial disputes in the United States.[1]

In *Michaelson* v. *United States* (1923),[2] a Circuit Court of Appeals declared that the above provisions of the Clayton Act were unconstitutional and that a court of equity had an inherent power to punish summarily, as contempt, disobedience to an order committed under circumstances which make the offence a crime by the ordinary law. This decision was unanimously reversed on appeal by the Supreme Court of the United States, which also held that the jury provision of the Clayton Act is mandatory and not permissive.[3]

A recent decision of the United States Circuit Court

1921); *Craig* v. *Hecht*, 263 U.S., 255, 281 et seq. (1923); *Cornish* v. *United States*, 299 Fed., 283 (6 Circ., 1924).

[1] *Harvard Law Rev.*, xxxvii, 1038–58.

[2] 291 Fed., 940.

[3] 266 U.S., 42 (1924).

of Appeals for the first Circuit has added the weight of its authority to the opinions delivered in *Ex parte Robinson* and the *Michaelson Case*, with regard to the intention and effect of the Act of 1831 and the Clayton Act, and the construction of the phrase 'so near thereto as to obstruct the administration of justice'. This is the case of *Coll y Cuchi* v. *United States*,[1] in which the opinion on a writ of error was delivered in September 1925. Dr. Coll, the plaintiff in error, challenged the judgement of a District Court upon an information for criminal contempt, tried by a Judge without a jury, under which the plaintiff in error was sentenced to imprisonment. The contempt consisted in tampering with a witness who was to give evidence for the Government at the trial of an indictment for conspiring to violate the National Prohibition Act and had already given evidence before the grand jury. The interview at which the witness was said to have been tampered with took place at Dr. Coll's house, four miles from the court-house where the indictment was to be tried, and it was held by the District Court that this came within the definition in the Act of 1831 of misbehaviour in the presence of the Court 'or so near thereto as to obstruct the administration of justice'. The District Court expressed an opinion that if the interview had taken place at the house of the witness, twenty miles away, Dr. Coll 'would equally have been guilty of violating the law governing this matter of contempt'. The Circuit Court of Appeals, after commenting on the Act of 1831 and referring to the genesis of it as described by Messrs. Frankfurter and Landis,[2] held that the construction, laid down by the District Court fell little short of nullifying the Act and could not be sustained.

Referring to the *Toledo Newspaper Case*[3] as distinguishable on the facts and difficult to reconcile, in respect of some expressions, with the unanimous decision of the Supreme Court in the *Michaelson Case*, the opinion of the Court of Appeal continues: 'We may observe generally,

[1] 8 Fed. (2nd ser.), 20. [2] *Harvard Law Rev.*, xxxvii, 1010, 1023 ff.
[3] See p. 211, *supra*.

that it is now settled by decisions of the highest Court in the land that the broad, almost unlimited, power to punish summarily for contempt, asserted by many courts, may constitutionally be, and has been limited by legislative enactment. It is now beyond question that the Act of 1831 (Jud. Code, s. 268) and ss. 21, 22 of the Clayton Act of October 15, 1914 (38 Sts. 738), are, in the Federal Courts, valid restrictions on powers which many Courts have asserted as inherent in all real courts'.[1]

The phrase 'or so near thereto as to obstruct the administration of justice' seems to have been introduced for the first time by the Act of 1831 and may have been based on a modification of the enlarged construction of the words 'in the presence of the Court' adopted by early English cases (see page 54, *supra*). The numerous reported cases in which punishment is said to have been inflicted for contempt on the service of process seem to have been based on an extended notion of the presence of the Court. Mr. Justice Wilmot says in *Almon's Case*:[2] 'The law considers it as a contempt of the authority of the Court to abuse and vilify the person who is acting under it'. In *Birch* v. *Walsh* (1846)[3] the Master of the Rolls in Ireland speaks of 'contumely or disrespect in the face of the Court or of its minister charged with the execution of its acts'. The punishment of this form of contempt is specifically provided for by the Act of 1831 under the description of 'resistance to process', &c.

It seems to follow from the interpretation of the Act of 1831 in the *Toledo Newspaper Case* that the expression 'so near thereto' has no relation to space and is therefore surplusage. Lord Bacon says: 'The place of Justice is an Hallowed Place; and therefore, not only the Bench but the Foot-pace and Precincts and Purprise thereof ought to be preserved without scandal and corruption' (Essay 'Of Jurisdiction'). When once you get beyond the precincts of the Court, the space within which

[1] Cf. *Merchants S. & G. Co.* v. *Board of Trade*, 201 Fed., 20, 26, 29.
[2] Wilmot, *Notes*, 270.
[3] 10 Irish Eq. Rep., 93, 96.

obstruction of justice can take place is boundless. By the law as laid down in the *Toledo Case* the question whether the misbehaviour took place far from or near to the Court does not arise. The only question is whether it caused or tended to cause an obstruction to the administration of justice; if it did, it must of necessity have been near enough to the Court to do so. To carry the matter to its logical conclusion, it may be argued that as the essence of contempt is that it obstructs or tends to obstruct the administration of justice, the decision in the *Toledo Case* extends to every form of contempt out of court, without exception. This renders the provisions in the Act of 1831 nugatory, and proves that when the law-makers inserted the words 'so near thereto' in the Act they intended them to be read as imposing a limitation of space on the rest of the sentence. But the opinion in the *Toledo Case* must now be read in connexion with that of the Supreme Court in the *Michaelson Case.*

In the recent case of *Cooke* v. *United States* (1924),[1] Mr. Chief Justice Taft, in delivering the opinion of the Supreme Court of the United States, laid it down that where a contempt is committed constructively in the presence, but not in the actual view, of the Court, the accused should have notice of the charge against him and a reasonable opportunity to meet it by way of defence or explanation. This includes the assistance of counsel if requested and the right to call witnesses to give testimony relevant either to the issue of complete exculpation or in extenuation of the offence and in mitigation of the penalty to be imposed. The Court considered that where conditions do not make it impracticable or where the delay may not injure public or private right, a Judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, ask that one of his fellow-judges shall take his place in adjudicating upon the charge.

The position of the inferior Federal Courts, as regards the punishment of contempts out of court, may be summed

[1] 267 U. S., 517.

up as follows. According to the *Robinson Case* (1873), the power of the Courts has been limited and defined by the Act of 1831. According to the *Toledo Case* (1918), the Act of 1831 imposed no limitations on the Court which did not already exist, and the effect of the decision seems to be to enable the Courts to punish by summary process any contempt which obstructs or tends to obstruct the administration of justice. According to the *Michaelson Case* (1924), an Act of Congress limiting the powers of the Court by interposing a jury trial is constitutional and binding on the Courts. From *Dr. Coll's Case* it may be concluded that the weight of authority is now in favour of the view that as regards the inferior Federal Courts the Legislature may constitutionally limit the power to punish for contempt, and that to tamper with a witness under the circumstances disclosed in this case does not fall within the expression 'misbehaviour of any person in the presence of the Court or so near thereto as to obstruct the administration of justice' contained in the Act of 1831. It will, however, be borne in mind that the opinion in *Dr. Coll's Case*, being that of a Circuit Court of Appeals, is subject to an appeal to the Supreme Court and is not binding upon the other eight Circuit Courts of Appeals.

With regard to the *Toledo Case*, the following question is respectfully submitted. If the Supreme Court of the United States had received proof that, by common law, libels on the Court were only punished after summoning a jury to the trial, what effect would the evidence have had on the opinion of the Court? The decision in that case does not hold the Act of 1831 to be unconstitutional but relies on it as confirming the previously existing law. According to the construction placed upon the Act by the *Toledo Case*, a libel on the Court is punishable summarily if it obstructs or tends to obstruct the administration of justice, and this is Wilmot's doctrine. If, then, the Act of 1831, which is admitted to be binding, does not declare the previously existing law correctly, is the Court to be governed by the Act or by the previous law with which the Act is in conflict?

Some of the State courts are not in accord with their Legislatures, the later judicial view inclining to ignore statutory limitations and to rely on the common law, which is assumed to be correctly laid down by Mr. Justice Wilmot.

Judge John L. Thomas of the Missouri Supreme Court has given us the history of the subject in his *Law of Constructive Contempt* (1904). The author, citing *Ex parte Foster*,[1] says that the power of the Legislature over contempt and contempt practice is sustained by an overwhelming weight of authority in the United States and that the constitutionality of contempt statutes has been upheld in eighteen States by judicial decisions which he cites. Further, he says, that no court in the United States ever set aside a statute in order to acquire jurisdiction in a contempt case until the Supreme Court of Arkansas did so in the case of *State* v. *Morrill*[2] in 1855 (Thomas, 80–82). In that case the defendant published a newspaper article which by implication charged the Judges of the Supreme Court of Arkansas with having been bribed to give a certain decision in a case that was finally concluded. The Court made an order on the defendant to show cause why proceedings should not be taken against him for criminal contempt. The defendant pleaded the Act of the State prescribing that in certain instances, and no others, the Court could punish summarily for contempt. It was admitted that the offence charged did not fall within the instances specified in the Act. It was also said for the defendant that it was not a contempt of court because it did not relate to a cause then pending. In delivering its opinion the Court said:

> We say in the language of Mr. Justice Scott in *Neil* v. *The State* (4 Eng. 263) that 'the right to punish for contempts in a summary manner has been long admitted as *inherent in all Courts of Justice*[3] and in legislative assemblies, founded upon great principles which are coeval and must be coexistent with the administration of justice in every

[1] 44 Tex. Crim. App., 423. [2] 16 Arkansas, 384.
[3] The italics of the reporter are preserved throughout.

country, the power of self-protection. . . . It is a branch of the common law brought from the mother country and *sanctioned by the Constitution* (p. 388).

The Act sanctions the power of the Courts to punish as *contempts* the 'acts' therein enumerated; it is merely declaratory of what the law was before its passage. The Act is not binding on the Courts (p. 391).

The Court cited *Blackstone's Commentaries* (iv, 284), *Read and Huggonson's Case*[1] (2 Atkyns, 469), Holt on *Libel*, Ch. ix, *Almon's Case* (Wilmot's *Notes*, 243), and, amongst American cases, *Commonwealth* v. *Dandridge* (2 Virginia Cases, 409), and proceeded as follows:

The cases above cited (and many more might be cited if deemed at all necessary) abundantly show that, by the common law, courts possessed the power to punish as for contempt libelous publications of the character of the one under consideration upon their proceedings *pending* or *past*, upon the ground that they tended to degrade the tribunals, destroy that public confidence and respect for their judgements and decrees so essentially necessary to the good order and well being of society, and most effectually obstructed the free course of justice (pp. 399, 400).

This is no other than Wilmot's doctrine in full.

Commonwealth v. *Dandridge* (1824),[2] referred to above, was decided by the General Court of the State of Virginia. In that case a rule was made that the defendant should show cause why he should not be punished for contempt in insulting the Judge at the door of the Court-house and charging him with corruption and cowardice in the decision of a case.

On the question whether the power to proceed summarily could be exercised when the contempt was committed after the conclusion of the case to which it related, the Court said:

Upon this part of the subject and in reference to cases which have an indirect bearing on the present question a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the Judge but not so far as touch his past conduct. In reason, I see but one pretence for this distinction. Threats and menaces of insult or injury to a Judge in case he shall render a certain judgement may be considered as impairing his independence and impartiality in

[1] Also cited as *Roach* v. *Garvan*.

[2] 2 Virginia Cases, 409.

the particular case to which the threats refer. And if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a Judge, 'If he render a certain judgement against me, I will insult or beat him'. For this he may be attached. But if (the judgement having been rendered) this insult be actually offered, an attachment no longer lies, because the contempt is in relation to the past conduct of the Judge, and to a case no longer pending. A recurrence to original principles—the only true test—by demonstrating that the weight, authority, and independence of the Court may be equally assailed either way, will prove that this distinction is merely ideal (Thomas, 248, 249).

Here we can see Wilmot's doctrine under the title of 'original principles'. With respect, the dilemma suggested by the Court is answered by itself when it points out the distinction between threats before and actual injury after the final decision. The answer implies that insult offered after the case is over is punishable only in the ordinary course of law because the misbehaviour cannot affect the judgement already delivered. It will be observed that *Dandridge's Case* was decided before the Act of 1831.

In *State* v. *Frew and Hart* (1884)[1] the defendant attempted by publications either to influence the Court in the disposition of a pending cause or to bring the Court into contempt for not deciding in his favour. The Supreme Court of Appeals overruled the provisions of a statute which would have prevented a summary procedure and the defendant was sentenced on attachment.

The following are extracts from the judgement:

It is well established by the authorities that the power is inherent in Courts of Justice to summarily punish constructive as well as direct contempts, and in this country where the Courts are, in the divisions of power by the Constitutions of the several States, constituted a separate and distinct department of government clothed with jurisdiction and not expressly limited by the Constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the Government.

[1] 24 W. Virginia, 416.

Snyder J. said:

It may be stated as a proposition of law unquestioned and unquestionable that by the common law of England as well as by the uniform decisions of the Courts of this country, Courts have the inherent power to punish contempts in a summary manner, and that this power is an essential element and part of the Court itself, which cannot be taken away without impairing the usefulness of the Court, because it is a power necessary to the exercise of all others.

Two other State Courts have held that the inherent power of a court to punish contempts out of court cannot be limited by the legislative power, viz. in Georgia [1] and in Virginia.[2] According to Judge Thomas, these four cases stood alone in holding statutes unconstitutional in the matter of contempt, until the decision in *State* v. *Shepherd* by the Supreme Court of Missouri in 1903,[3] the judgement in which the learned Judge quotes in full (*Thomas*, 73, 74, 177 ff.).

In the *Shepherd Case* the defendant, a newspaper publisher, was cited on the application of the Attorney General to show cause why an attachment should not issue against him for contempt in publishing a libel on the Supreme Court of the State of Missouri relating to a judgement pronounced by that Court. The defendant pleaded, *inter alia*, certain provisions of the Constitution of the State and a provision of a statute of the State [4] defining the powers of the Court to punish contempts. The statute enacted that every court of record should have power to punish as for a criminal contempt persons guilty of any of the following acts and no other: misbehaviour in the presence of the Court; disturbance interrupting the proceedings of the Court; wilful disobedience of any process or order; resistance to order or process; refusal to be sworn as a witness or to give evidence when sworn.

After describing the nature of the contempt, the Court said (*Thomas*, 189):

[1] *Bradley* v. *State*, 111 Ga., 168.
[2] *Carter* v. *Commonwealth*, 96 Virginia, 791. [3] 177 Missouri, 205.
[4] *Revised Statutes of Missouri*, 1899, S. 1616; Thomas, 184.

The books are full of cases, both English and American, where other courts have been similarly scandalized and have punished the vilifiers as for a contempt of court.

As to the inherent power of courts of record to punish contempts, the Court said (*ibid.*):

The power to punish for contempt is as old as the law itself and has been exercised so often that it would take a volume to refer to the cases. From the earliest dawn of civilization the power has been conceded to exist. It has been exercised, or not, as a matter of public policy, but its existence has never been denied. In England it has been exercised when the contempts consisted of scandalizing the sovereign or his ministers, the law-making power or the Courts. In the American Colonies the same rule obtained and was exercised quite frequently. Since the Revolution and the adoption of the Constitution of the United States and the establishment of the government of the people by the people and for the people, the English rule has been modified so far as the executive department and the ministers of state are concerned, and in some degree so far as the legislative department is concerned, but has been almost universally preserved so far as the judicial department is concerned.

. . . . . .

The Courts of England have uniformly from the beginning exercised the right to punish for Contempt and the Courts of America have always exercised a like power (citing Blackstone, *Commentaries*). (*Thomas*, 195.)

The passage cited from Blackstone (iv, 285) is that in which the author includes 'speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity', under the head of 'Summary proceedings' 'immemorially used by the superior Courts of Justice for punishing contempts by attachment'. It has been shown (p. 21, *supra*) that in preparing his *Commentaries* Blackstone compared notes with Wilmot. Blackstone's 'immemorially used' corresponds with Wilmot's 'stands upon the same immemorial usage' (Wilmot, *Notes*, 254).

With regard to contempts punishable summarily, the judgement in the *Shepherd Case* cites the following amongst other English cases: *Rex* v. *Almon*, Wilmot, *Notes*, 243; *Case of the St. James's Evening Post* (*Read and Huggonson's Case*),[1] 2 Atkyns, 469; *Re Charlton*,

[1] Also cited as *Roach* v. *Garvan*.

2 Mylne and Craig, 316; *Macgill's Case*, Fowler's Exchequer Practice, ii, 404; *Ex parte Turner*, 3 Montagu D. and D., 523; *Re Wallace*, L.R., 1 P.C., 283; *Reg.* v. *Skipworth*, 12 Cox Crim. Cases, 371 (*Thomas*, 202–209).

It is said by the Court in *Shepherd's Case* that in *Rex* v. *Almon* 'it was held to be a contempt of court and a libel, punishable by attachment, to publish a pamphlet asserting that Judges have no power to issue an attachment for libels upon themselves, and denying that reflections upon individual Judges are contempts of court at all'.[1] The libel complained of in *Almon's Case* seems to have been confused with the argument on the application for attachment. The libel in that case was under two heads: (1) 'It charges the Court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject of the benefit of the *Habeas Corpus* Act';[2] and (2) it charges the Chief Justice with amending an Information 'officiously, arbitrarily, and illegally'.[3]

With regard to the power of the Legislature to abridge the inherent power of the Court to punish contempt,[4] it is said by the Court in the *Shepherd Case* that 'the law is well settled, both in England and America, that the Legislature has no power to take away, abridge, impair, limit, or regulate the power of courts of record to punish for contempts', and several American cases are cited. The reference to the law of England can only mean, as Judge Thomas points out (p. 75), that the English authorities have settled the point so far as an American Legislature is concerned, because it is inconceivable that any court would assert that the English Legislature has no such power.

Section 28, article 2, of the Constitution of Missouri, pleaded by the defendant Shepherd, declares that the right of trial by jury shall remain, and the Court cites several cases, including the English one *Regina* v. *Skip-*

[1] *Thomas*, 207.
[2] Wilmot, *Notes*, 243.
[3] *Ibid.*, 245.
[4] *Thomas*, 209, ff.

worth (1873),[1] to prove that contempts had never been tried by a jury, and concludes:

> The right of trial by jury in contempt cases never existed at common law and was wholly unknown to the laws of Missouri at the time of the adoption of the Constitutions of 1820, 1865, and 1875. The guaranty of the Constitution of 1875 therefore, that 'the right of trial by jury, as heretofore enjoyed, shall remain inviolate', was not intended to confer such a right in contempt cases, for such a right had never been 'heretofore enjoyed', either in this State or in England. There is therefore no merit in the demand of the defendant in this case for a trial by jury (*Thomas*, 221).

After speaking of the liberty of the press and libel in general, the Court proceeds:

> Such practices are an abuse of the liberty of the Press, and if the slander relates to the Courts, it concerns the whole public, and is therefore punishable summarily as a criminal contempt (*Thomas*, 240).

With the omission of the word 'summarily', the statement could be accepted without question, but it is difficult to follow the argument that because an offence concerns the whole public it should be punishable summarily. On principle, there seems to be no reason why the public, who must be the prosecutor, should have any special right to deprive an accused person of the protection of a jury.

Amongst the earlier American cases in which the Courts had summarily punished persons as for a criminal contempt on account of publications which were calculated to bring public odium upon the Court, that of *Respublica* v. *Oswald*,[2] decided by the Supreme Court of Pennsylvania in 1788, is relied on. In that case *Re Read and Huggonson* (1742)[3] and *Blackstone's Commentaries*[4] were cited in argument, and the Court was of opinion that the procedure by attachment was correct, because the punishment must be immediate (M'Kean C.J.). The defendant was

[1] 12 Cox Crim. Cases, 371; cited at pp. 30 ff., *supra*.

[2] 1 Dallas, 319. See Thomas, 227–31, 244.

[3] Also cited as *Roach* v. *Garvan*, 2 Atkyns, 469. See pp. 101 ff., *supra*.

[4] iv, 280.

fined and imprisoned for publishing newspaper comments on pending proceedings and refusing to answer interrogatories. He afterwards presented a memorial to the House of Representatives praying that the Judges might be impeached, but the House declined to interfere.

Another of the older decisions cited in the *Shepherd Case* is that of *Respublica* v. *Passmore* (1802),[1] also in the Supreme Court of Pennsylvania, where the defendant was summarily fined and imprisoned for contempt in publishing an article reflecting upon a party to proceedings and tending to interfere with the course of justice.[2] Following on this case, the Judges who decided it were impeached but were acquitted by the Senate. In 1809 the Legislature of Pennsylvania passed an Act regulating the punishment of contempt, upon which, substantially, the Act of 1831 was modelled (see Frankfurter and Landis, *Harv. Law Rev.*, xxxvii, 1037).

Judge Thomas points out (p. 79) that the *Oswald* and *Passmore* cases have not been followed in the State of Pennsylvania for a hundred years.

State v. *Morrill* (1855)[3] and *Commonwealth* v. *Dandridge* (1824)[4] are also relied on by the Court in the *Shepherd Case* (*Thomas*, 246–249). Several cases in the State courts later than *State* v. *Morrill* are also cited in the judgement (*Thomas*, 249–254). All these are authorities for the punishment of contempts out of court by attachment.

In the *Shepherd Case* the seven Judges constituting the court unanimously found the defendant guilty of contempt and fined him five hundred dollars (*Thomas*, 185, 260), thus upholding Wilmot's doctrine and overriding the Missouri statute regulating contempt.

It has thus been shown that in several States the Judiciary has asserted a common law power of the Court to punish contempt by summary process, as a crime, notwithstanding statutory enactment to the contrary. On the other hand, in many States the opposite view has

[1] 3 Yeates, 441.
[2] *Thomas*, 78, 245.
[3] See p. 218, *supra*.
[4] See p. 219, *supra*.

prevailed, and statutes regulating the punishment of contempts have been held to be constitutional and binding on the Courts. If the conclusion submitted by the present writer is correct—if the doctrine definitely laid down by Mr. Justice Wilmot in *Almon's Case*, confirmed by Mr. Justice Blackstone, and, in effect, declared by Lord Hardwicke in *Roach* v. *Garvan*,[1] is founded on a fallacy—the result may be that where, in the United States, there is a conflict between the Judiciary and the Legislature, the Legislature and not the Judiciary has correctly interpreted the law, and the decisions asserting the power of the Court to punish certain classes of contempt by summary procedure will need reconsideration. The Courts will have discarded the statutes and founded themselves on English decisions, whereas the law turns out to be, not what the decisions indicate, but what the American statutes have declared it to be.[2]

[1] 2 Atkyns, 469.

[2] Professor Frankfurter and Mr. Landis agree with my contention that Wilmot's doctrine is founded on a mistaken view of the common law. (*Harv. Law Rev.*, xxxvii, 1042–47.)

APPENDIX

(referred to at pp. 49, 50, 54, 85, 108, 155*n.*, 156, 187).

Instances, principally, of contempt committed by strangers out of court, or not in the actual view of the court, and tried by a jury, or by confession.

Note. The name 'Solly-Flood', where it appears in the following list, implies that the entry was extracted from the records by the late Mr. Solly-Flood, Q.C., and unless otherwise indicated, was noted by him in the *Transactions of the Royal Historical Society*, vol. iii, N.S., pp. 147–9. Where 'Solly-Flood MS.' appears, the reference is to his *Abridged History of the Writ of Habeas Corpus* mentioned in the Preface.

(1) A. D. 1253

Curia Regis roll, M. 37-8 Henry III, m. 12 d (Solly-Flood). *Placit. Abbrev.*, p. 132, rot. 12.

Attachment of William de Lisle *ad respondendum* in a plea wherefore he made an assault in court on one of the King's clerks. Defendant pleads not guilty and puts himself upon the country. The Sheriff is ordered to summon a jury.

Note. In this and other cases where the contempt was committed in court and the trial was by a jury, it is suggested that the act of contempt was not done in the actual view of the Justices.

(2) A. D. 1254

Curia Regis roll, H. 38 Henry III, m. 8 d (Solly-Flood MS., p. 418).

Action by Sheriff for resistance to execution of writ. Defendant pleaded not guilty, jury ordered. Defendant made fine by 5 marks.

(3) A. D. 1254

Curia Regis roll, M. 38-9 Henry III, m. 22 d (Solly-Flood).

Action for contempt and hindering proceedings in Court.

(4) A. D. 1276

Coram Rege roll, P. 4 Edward I, minus r., m. 4 (Solly-Flood MS., p. 418).

Inquisition as to the truth of Sheriff's return that defendant had violently resisted the execution of a writ. Jury found defendant guilty.

(5) A. D. 1276

Coram Rege roll, P. 4 Edward I, majus r., m. 6 (Solly-Flood MS., p. 418).

Action by Sheriff for resistance to execution of writ.

(6) A. D. 1279

Coram Rege roll, M. 7 & 8 Edward I, m. 27 (Solly-Flood MS., p. 418).

Action for assaulting bailiff and resisting execution of a writ.

(7) A. D. 1289

(18 Edward I.) *Rot. Parl.*, i, 17 a.

Placita coram ipso domino rege et eius consilio. Complaint of the Earl of Cornwall that the Prior of Holy Trinity, London, at the instigation of Bogo de Clare, served the Earl with a citation in Westminster Hall while he was on his way to the Council. The respondents pleading that they acted in ignorance, place themselves on the grace, mercy, and goodwill of the King, and are committed to the Tower to be kept there at the King's will. Bogo makes fine with the King in 1,000 marks and gives pledges for £1,000 damages, of which the Earl remits all but £100.

Note. This case appears to have been treated as a proceeding at common law in which the respondents, if they had denied the offence, would have been entitled to claim a trial by jury. (See the case of 21 Edward I, *Rot. Parl.*, i, 95 a, *infra.*) As they confessed the offence, no further trial was necessary.

(8) A. D. 1289

(18 Edward I.) *Rot. Parl.*, i, 33 b.

Placita coram ipso domino rege et eius consilio ad parliamentum. J. W. complained of by H. de C., the Queen's Steward, that while the latter was presiding in the Court of the barony of Haverford, J. W. entered with a number of men and impeded the business. J. W. denies it and says he entered with two serving men and puts himself upon the country. H. de C. does the like. Two Justices are assigned to inquire the truth of the matter.

Note. This case appears to have been referred by the Council to two of the Justices to be tried at common law.

(9) A. D. 1291

(20 Edward I.) *Rot. Parl.*, i, 82 a.

Placita in Parliamento. Ordered that Theobald de Verdun should produce certain Welshmen convicted in the Curia Regis of contempt and trespass done to the King before the King and his Council at Westminster at his Parliament. Theobald failed

to produce the men and gave false testimony as to them, and was put to ransom before the King himself how he would acquit himself in the premises, and he put himself on a jury of the country.

(10) A. D. 1291

(20 Edward I.) *Rot. Parl.*, i, 83 b.

Memorandum as to the amercement of John de Lisle that it be assessed by the Council at 100*s.* for contempt done to the King at Winchester before his Justices at the assizes.

(11) A. D. 1293

Coram Rege roll, P. 21 Edward I, par. i, m. 95 (Solly-Flood).
Rot. Parl., i, 95 a.

Placita coram ipso domino rege et consilio suo ad Parliamentum. Information by petition to Parliament of William de Bereford J. against two respondents for insulting him in court. It appears as well by the testimony of worthy men as by the acknowledgement of the respondents, that in the Aula Regis in the presence of the principal magnates the respondents assaulted the petitioner with words of contumely, in contempt of the King. The respondents are imprisoned at the King's will, and because one respondent had transgressed less than the other, the former is admitted to bail (see note to case in 18 Edward I, *Rot. Parl.*, i, 17 a, *supra*).

(12) A. D. 1293

Coram Rege roll, T. 21 Edward I, m. 28 d (Solly-Flood MS., p. 418).

Action by the King for obstructing his bailiff in the execution of a writ, the defendant saying he did not care for the King's writ more than for ... Plea not guilty. Defendant tried by a jury and acquitted.

(13) A. D. 1293

(21 Edward I.) *Rot. Parl.*, i, 94 b.

Placita coram ipso domino rege et consilio suo ad Parliamentum suum. The complainant alleges that the Sheriff of Devon has not executed a writ, in contempt, &c. The Sheriff pleads that he never received the writ and puts himself upon the country, and the plaintiff does the like. To be tried by a jury of twenty-four.

Note. If an officer of justice could claim a trial by jury, *a fortiori*, a stranger.

(14) A. D. 1293

(21 Edward I.) *Rot. Parl.*, i, 94 a. *Cal. Pat. Rolls*, 1292–1301, p. 41.

Placita coram ipso domino rege et consilio suo ad Parliamentum suum. Complainant alleges that Richard of Gravesend, Bishop

of London, snatched a letter from the hand of the Justices' clerk and carried it away in contempt of the King and his Court and to the complainant's damage. The Bishop confesses and it is considered that he shall remain to be punished at the King's will. The King reserves to himself the punishment to be inflicted and orders the letter to be delivered to the plaintiff. Afterwards the Bishop is pardoned. See note to case 18 Edward I, *Rot. Parl.*, i, 17 a, *supra*.

(15) A. D. 1293

Year Books (*Rolls Series*), 21 & 22 Edward I, 94.

A. brought the attachment on prohibition against W. and Isabel his wife on the King's behalf. W. was charged with trampling the prohibition under his feet on being served with it, and upon his denying the contempt, the question was to be tried by a jury.

(16) A. D. 1293

(22 Edward I.) *Plac. Abbrev.*, p. 290, rot. 33.

Defendant charged with procuring an omission in a record and producing it with intent to deceive the Court. Defendant is found guilty by a jury and committed to the Marshal.

(17) A. D. 1293

(22 Edward I.) *Plac. Abbrev.*, p. 291, rot. 7.

Placita coram domino (*rege*). William de Sadington complains that defendant struck him in Westminster Hall. The plaintiff was seen in court, bloody. Plaintiff recovers damages assessed by the Court (*per curiam*) at 20*s.* and defendant is committed to the Marshal.

Note. The fact that the damages were assessed by the Court suggests that the judgement was upon the defendant's confession.

(18) A. D. 1294

Coram Rege roll, P. 22 Edward I, m. 39 (Solly-Flood). *Plac. Abbrev.*, p. 291, rot. 39.

Complaint by two of a jury that the defendant falsely accused them of making a false oath. Defendant denies the words. A jury is empanelled *instanter*, who find that the defendant spoke the words in contempt of the King. Defendant is committed to the Marshal and to pay the complainants 6*s.* 8*d.* damages.

(19) A. D. 1302

Coram Rege roll, T. 30 Edward I, m. 9 d (Solly-Flood).

Action for assaulting the plaintiff in open court.

(20) A. D. 1302

(31 Edward I.) *Plac. Abbrev.*, p. 296, rot. 70.

For hindering the Sheriff's Tourn with threats and gross words the defendant is committed to the Marshal and makes fine.

Note. The fact that this is entered on the roll suggests that it was not a summary committal (see p. 53, *supra*).

(21) A. D. 1303

Coram Rege roll, H. 31 Edward I, m. 19, m. 76 (Solly-Flood MS., p. 418).

Action by attachment to answer the King for contempt and resisting a writ *de vi laica amovenda*. Plea not guilty. A jury summoned to try.

(22) A. D. 1305

Coram Rege roll, M. 33 & 34 Edward I, m. 75 (Solly-Flood). *Plac. Abbrev.*, pp. 256-7, rot. 75, 3 Inst., 142.

Information before the King and his Council by Roger de Hegham, Baron of the Exchequer, against William de Brewes for abusing him in open court. Defendant confesses and is sentenced to ask pardon in court and to be imprisoned at the King's will.

Note. Solly-Flood is mistaken in supposing that the informant was Chief Justice. Ralph de Hengham was Chief Justice of the Common Pleas in 33 & 34 Edward I.

(23) A. D. 1309

(3 Edward II.) *Plac. Abbrev.*, p. 308, rot. 35. *Coram Rege roll*, M. 3 Edward II, m. 35 (Solly-Flood MS., p. 420).

Qui tam action by attachment alleging that defendant on being served with a writ of prohibition, threw it on the ground and trampled it underfoot, in contempt of the King £1,000 and to the damage of the plaintiff £100. Plea not guilty. Tried by a jury. Adjudged that the plaintiff recover against the defendant his aforesaid damages. And the defendant *capiatur*.

(24) A. D. 1313

(6 & 7 Edward II.) *Eyre of Kent* (Seld. Soc.), i, 185.

It is found by a jury before the Justices in Eyre that defendant attacked plaintiff with a knife in the presence of the Justices and that plaintiff was endamaged to the sum of 40 marks. Judgement that plaintiff recover his damages and that defendant be committed to prison. The King pardons the defendant and orders him to be acquitted of the imprisonment and of whatsoever pertains to the King by reason of the outrage and trespass.

(25) A. D. 1314

(8 Edward II.) *Rot. Parl.*, i, 316 b.

Petitiones in parliamento. Petitioner alleges that when prosecuting a complaint against two persons before the Sheriffs of London one of the respondents struck and wounded him. Petitioner is afraid to seek justice on account of the respondent's power and seeks a remedy. Ordered by the Council that the petitioner have a writ of trespass before the King, making mention of the contempt.

(26) A. D. 1315

(9 Edward II.) *Rot. Parl.*, i, 359 b.

Justices of the King complain to the Parliament at Lincoln that while on the business of the King at Bristol the Commonalty of that city assaulted and imprisoned them. Six men of the Commonalty are summoned to attend before the Council at Westminster. A writ issues summoning a jury to attend. The jury find mainly against the Commonalty, who make fine by 4,000 marks. The fine includes the pardon of the outlawry of certain men who came not before the Justices of the King assigned to hear and determine the said contempts.

Note. The Council appears to have referred the case to some of the King's Justices to be tried at common law.

(27) A. D. 1317

Coram Rege roll, T. 11 Edward II, m. 48 (Solly-Flood). *Plac. Abbrev.*, p. 331, rot. 48.

Action by one of a jury for an assault upon him while on his way to the Court. Tried by a jury of bystanders in the Court (*Solly-Flood*).

Two persons attached without writ to answer a Sworn Clerk of the King's Court wherefore when he was coming from Fleet Street to transact the business of the King the respondents assaulted, beat, and wounded him. The trespass is said to have been done in the presence of the Court. The Marshal is ordered to summon twelve men of the Court and the Sheriff twelve men of the neighbourhood of Fleet Street, *instanter*, to inquire. The jury finds one respondent not guilty and one guilty with 100*s.* damage, and the latter is committed to the Marshal and makes fine with the King. (*Plac. Abbrev.*)

Note. These two accounts of the same proceeding vary in the details, but agree in this, that an assault upon a person (a juryman or a clerk of the Court) on his way to the Court, was submitted to the verdict of a jury. The proceeding was commenced without writ, probably by bill.

(28) A. D. 1319

Coram Rege roll, P. 12 Edward II, m. 114 d (Solly-Flood MS., p. 420).

Action by original writ at the suit of the King for refusing to assist in executing a writ of *capias* and throwing it on the ground.

(29) A. D. 1319

Coram Rege roll, T. 13 Edward II, m. 14 (Solly-Flood). *Plac. Abbrev.*, p. 336, rot. 14.

Action of trespass by the Mayor of the Staple. Defendant attached to answer for abusing and assaulting the plaintiff in Westminster Hall. Tried by a jury empanelled *instanter*. Verdict for the plaintiff, damages £100. Defendant committed to the Marshal's prison at the King's will.

Note. It appears that the punishment for the contempt was referred to the Council.

(30) A. D. 1323

Coram Rege roll, M. 17 Edward II, m. 16 d (Solly-Flood). *Plac. Abbrev.*, p. 342, rot. 16.

Defendant found guilty by a jury of making a disturbance and hindering the Justices of Assize from holding their Court. Plaintiff recovers damages and defendant is committed to prison.

(31) A. D. 1323

Coram Rege roll, M. 17 Edward II, m. 16 d (Solly-Flood).

Action for assault by an appellee upon the appellor on his way to the Court

(32) A. D. 1323

Coram Rege roll, M. 17 Edward II, m. 63 (Solly-Flood).

Action for abusing in Court a party to a suit.

(33) A. D. 1323

Coram Rege roll, M. 17 Edward II, m. 69 (Solly-Flood). *Plac. Abbrev.*, p. 343, rot. 69.

John le Norris, a Juror, complains of Adam de Bykerstaffe, who accused the complainant and his fellow jurors in the presence of the Justices of giving a false verdict in contempt of the King's Court and to the scandal of the jury. Respondent pleads not guilty and puts himself upon the country. The respondent is found guilty, upon which he is committed to prison and makes fine with 40*s*.

(34) A. D. 1331

Coram Rege roll, M. 5 Edward III, m. 128 (Solly-Flood).

Conviction of contempt *in facie* by the King's Court in Ireland reversed by writ of error because the contempt was not tried by a jury.

(35) A. D. 1332

Coram Rege roll, M. 6 Edward III, m. 30 d (Solly-Flood).

Action for contempt (*de placito contemptus*) in assaulting the plaintiff in open court.

(36) A. D. 1332

Coram Rege roll, T. 6 Edward III, rot. 30, Eboracum (*Harg. Tracts*, 363).

Attachment by bill *sine breve ad respondendum tam regi quam parti*, for a contempt committed in the county where the King's Bench sat.

(37) A. D. 1336

Coram Rege roll, P. 10 Edward III, Rex, m. 15 d (Solly-Flood).

Action by a jury for abusing them in open court.

(38) A. D. 1336

Coram Rege roll, P. 10 Edward III, m. 59 (Solly-Flood).

Action for contempt in assaulting plaintiff in open court.

(39) A. D. 1340

Y. B. (*Rolls Series*), 14 Edward III, 324–331.

Defendants attached by bill to answer a Justice of the King's Bench for insulting him in the presence of his fellow Judges as they were going to hold pleas. The plaintiff prayed that inasmuch as the offence was committed in the presence of the Justices they would take the inquest immediately; this was refused and a writ was sent to the Sheriff to cause twelve men to come from the neighbourhood of Westminster.

(40) A. D. 1343

Y. B. (*Rolls Series*), 17 Edward III, 276.

Per Shareshull J. A Justice of Nisi Prius may punish a trespass committed in his presence which sounds in contempt of the King and make process thereupon.

Note. This appears to exclude contempts committed out of court.

(41) A. D. 1344

Coram Rege roll, M. 18 Edward III, rot. 151 (cited by Sir E. Coke in *Wraynham's Case*, *How. St. Tr.*, ii, 1074).

Wilbraham petitions against the Justices of the King's Bench that they have not done according to law and reason. The petition is delivered to the King and his Council. Wilbraham is indicted, convicted, fined, and ransomed in the King's Bench.

(42) A. D. 1344

Coram Rege roll, M. 18 Edward III (3 Inst., 174).

John de Northampton, an Attorney, confessing that he had written a letter to one of the King's Council reflecting on the Judges of the King's Bench, it was adjudged by the King's Bench that the letter was a scandal upon the Court and John was committed to the Marshal and afterwards found sureties for his good behaviour (see pp. 23, 24, *supra*).

(43) A. D. 1345

Coram Rege roll, T. 19 Edward III, m. 77 (Solly-Flood).

Action for violent assault in Court.

(44) A. D. 1345

Y. B. (*Rolls Series*), 19 Edward III, 138, 19 *Lib. Ass.*, pl. 5.

Robert Hovel sues by petition to the King alleging that an assize was awarded against him contrary to law in the King's Bench and that some of the Justices awarded the assize contrary to the unanimous opinion of their fellows. The bill of petition is sent in a letter under the privy seal to Sir William Scot C.J., who said this suit was a slander on the Court in so surmising dishonesty in the Justices. Robert is ordered into custody and put on mainprize to answer the King. No further proceeding against him is recorded.

(45) A. D. 1345

Y. B. (*Rolls Series*), 19 Edward III, 452.

N. is indicted in the King's Bench that in the presence of the Justices he threatened and struck the jurors of an inquest. N. confesses. After consideration by the Council, Thorpe C.J. gives judgement that the offender's right hand be struck off and his

lands and chattels forfeited and that he be imprisoned for life; but execution is afterwards stayed until the King has signified his pleasure.

(46) A. D. 1346

Y. B. (*Rolls Series*), 20 Edward III, Part i, 228.

Writ of contempt against defendants for denouncing the plaintiff as being excommunicated because he delivered the King's prohibition to the Bishop. Judgement that plaintiff recover damages and the defendants be imprisoned for contempt.

Note. The judgement for damages implies a trial in the ordinary course of law.

(47) A. D. 1348

Coram Rege roll, H. 22 Edward III, m. 103 (Solly-Flood).

Presentment by jury for contempt and assault on one of themselves in court, removed by *certiorari*; defendant pleads not guilty, but is tried by a jury and convicted.

(48) A. D. 1348

Y. B., 22 Edward III, p. 13, pl. 26.

A Knight and Esquire indicted for raising strife before Thorpe C.J., who had attached J. for making an affray before him. Found by a jury that the Knight and Esquire attempted to rescue J. from the attachment and that the Esquire drew his sword to strike the Judge. The court awards that the Knight and Esquire be disinherited and suffer perpetual imprisonment and that the hand of the Esquire be cut off. J., for the affray and for breaking the attachment, is disinherited and sentenced to perpetual imprisonment.

(49) A. D. 1350

(24 Edward III.) *Bro. Abr.*, 'Imprisonment', 84 (citing *Y. B.*, 24 Edward III, p. 74).

He who pleads a deed which is adjudged against him by rasure, interlineation or other suspicion, shall be imprisoned and make fine, if this be found against him by jury or confession.

(50) A. D. 1352

Coram Rege roll, P. 26 Edward III, m. 60 (Solly-Flood).

Action by one of a jury for violent assault in open court; verdict guilty, damages £10, of which 120*s.* is awarded to the King.

(51) A. D. 1353

Y. B., Lib. Ass., 27 Edward III, pl. 49.

Action for trespass in the Palace at Westminster in the presence of the King and his Justices.

(52) A. D. 1356

Coram Rege roll, M. 30 Edward III, m. 113 (Solly-Flood).

Action for violent assault on the Attorney General in open court.

(53) A. D. 1356

(30 Edward III.) *Rot. Parl.*, ii, 266 a.

Petition to the Commons praying that when people are indicted before Justices in case of trespass or contempt, they may make their attorneys to plead so that they be not detained in prison until they be convicted, but that the Justices may cause them to have swift deliverance. *Answer.* This petition is accordant to the common law and by so much the King grants it at all points.

(54) A. D. 1356

Y. B., Lib. Ass., 30 Edward III, pl. 14.

Bill of trespass for assault on person coming to the Court to defend an action. The accused is attached to answer and pleads not guilty; he is convicted by a jury and put to find pledges for his good behaviour and of the peace.

Note. This case is cited by Hale C.J. as an instance of a suit by bill in the K.B. for contempt (*Hargrave's Tracts*, 363).

(55) A. D. 1356

Y. B., Lib. Ass., 30 Edward III, pl. 19 (cited in *Harrison's Case*, 14 Charles I, *How. St. Tr.*, iii, 1375).

Seton J. sues by bill in the Exchequer against the defendant for openly calling him traitor, &c., in the presence of the Treasurer and Barons of the Exchequer, in contempt of the King and to the slander of the Court. Defendant pleads 'not guilty' and the issue is tried by attorneys of the Common Bench and Exchequer. Defendant found guilty with damages 100 marks and imprisoned to abide the King's will.

Note. Sentence was no doubt pronounced by the Council.

(56) A. D. 1365

Y. B., Lib. Ass., 39 Edward III, pl. 1.

Suit by bill for assault on plaintiff before the gates of Winchester Castle as he was coming to the Court to prosecute an assize of novel disseisin. Defendant is found guilty by inquest with £10 damages and is committed. The Justices to consult with the Council what should be done as to the fine and with regard to the King for the assault made in the presence of the Justices.

(57) A. D. 1367

Y. B., Lib. Ass., 41 Edward III, pl. 25.

At Westminster a man struck a juror who found against him. The offender is indicted at the suit of the King and convicted. Judgement that his right hand be cut off and that he be imprisoned for life; his land to be seized into the King's hands.

(58) A. D. 1368

Y. B., Lib. Ass., 42 Edward III, pl. 18.

Bill of trespass for assault in Westminster Hall on a woman who was prosecuting an appeal against the defendant for the death of her husband; tried by a jury of stall-keepers in Westminster Hall empanelled *instanter*.

(59) A. D. 1385

Coram Rege roll, P. 8 Richard II, m. 50 (Solly-Flood MS., p. 420).

Qui tam action for assaulting the plaintiff while endeavouring to serve a writ of *distringas* issued out of the Exchequer.

(60) A. D. 1409

Bro. Abr., 'Exigent and capias', 55 (citing *Y. B.*, 11 Henry IV, pp. 14, 15, and 1 Henry V, p. 14).

If *rescous* returned upon a peer, *capias* shall issue against him for the contempt. But note that generally *capias* lies not against a peer, for he is understood to have sufficient to be distrained on. But for contempt *capias* lies.

Note. The *capias* is *ad respondendum*. If the contempt is denied a jury is summoned.

(61) A. D. 1413

Coram Rege roll, T. 1 Henry V, Rex, m. 15 (Solly-Flood).

Bill for attempting to rescue a prisoner from the interior bar of the Court and abusing the Marshal. Jury of officers of the Court ordered.

(62) A. D. 1421

Coram Rege roll, T. 9 Henry V, Rex m. 7, *Rex* v. *Cheddre* (Solly-Flood).

Presentment by jury for violent abuse of them while considering their verdict, removed by *certiorari*. Defendant arraigned, pleads guilty and prays to be admitted to make fine. The defendant afterwards offers the Council *sponte et non coactus* to pay 300 marks in three instalments, which sum is accepted by the Council. The Justices are ordered by writ of privy seal to record the amount as a debt due to the King and a pardon of all forfeitures on payment (see Nicolas, *Proceedings of the Privy Council*, ii, 298, 303, 321).

(63) A. D. 1432

Controlment roll, M. 11 Henry VI, m. 2 and 4 d. *Coram Rege roll*, M. 11 Henry VI, m. 12, Rex 19 (Solly-Flood MS., p. 436).

Attachment *ad respondendum de premissis*, described as 'for forcibly preventing the execution of a Writ'. Defendant pleads 'not guilty'. Tried by a jury and acquitted.

(64) A. D. 1442

Controlment roll, P. 20 Henry VI, m. 22 d and T. T. *Coram Rege roll*, T. 20 Henry VI, Rex (Solly-Flood MS., p. 436).

Attachment *ad respondendum de premissis*, described as for a rescue of a prisoner in Westminster Hall from the custody of the Sheriff of Middlesex. Pleads not guilty. *Ideo veniat juratam.*

(65) A. D. 1442

Controlment roll, T. 20 Henry VI, m. 36. *Coram Rege roll*, T. 20 Henry VI, Rex Ro. 33 (Solly-Flood MS., p. 436).

Bill at common law exhibited *instanter* for a great contempt, described at length as committed in open court of K.B. *sedente curia. Hore* (defendant) *se retraxit. Attachietur ad respondendum domino regi pro contemptu predicto. Franceys* (defendant) *petit se admitti ad finem cum rege faciendum et admittitur prout patet per rotulos finium istius termini. Ideo marescallus de eo exoneratur.*

(66) A. D. 1453

Y. B., 32 Henry VI, p. 34, pl. 30.

Bill of presentment for wrongful detention of an Attorney in the inner palace of the King. Tried by a jury of twenty-four attorneys.

(67) A. D. 1455

Bro. Abr., 'Judges', 21 (citing *Y. B.*, 34 Henry VI, 53; and see *ibid.*, p. 45, pl. 8).

Justices of the Bench can adjudge anything done before themselves without trial by jury.

(68) A. D. 1461

(1 Edward IV.) *Davies's Case*, Dyer, 188 [10]..

Indictment for striking a witness in the presence of the Court and threatening to hang him if he gives evidence.

(69) A. D. 1471

Y. B., 11 Edward IV, p. 3, pl. 4.

Per Choke J. Disseisin of office in the Bench, or rasure of a record, shall be tried by Filazers and Attorneys of the same court.

(70) A. D. 1474

(14 Edward IV.) *Rot. Parl.*, vi, 103a.

Petition to Parliament *ex parte* the Serjeant at Mace of one of the Sheriffs. He was ordered by writ to produce the body of a prisoner before the King in his Chancery. On returning the prisoner was rescued with violence. Prayed and ordered that if the offenders are taken they shall appear in the King's Bench to answer to the *rescous* upon a proceeding by writ or bill or else to stand convict and make great fine and have imprisonment as the King shall think convenient.

Note. 'As the King shall think convenient', i.e. at the King's will. The offence is against the King in his Chancery, i.e. the Council. The offenders will have the benefit of a trial at law, but if found guilty the Council will fix the punishment.

(71) A. D. 1565

(8 Elizabeth.) *Welch's Case* (cited in *Wraynham's Case* (1618), *How. St. Tr.*, i, 1080).

Indictment for saying: 'My Lord Chief Justice Catlyne is incensed against me; I cannot have justice nor can be heard, for that Court (the King's Bench) now is made a court of conscience'.

(72) A. D. 1595

(38 Elizabeth.) *Carye's Case*, Cro. Eliz., 405; Owen, 120.

Indictment for drawing a sword on the stairs of the Court of Wards and disturbing the Sheriff who was making an arrest.

(73) A. D. 1599

(41 Elizabeth.) *Dean's Case*, Cro. Eliz., 689.

Per Anderson C.J.: A man may be imprisoned for a contempt done in Court but not for a contempt out of Court.

(74) A. D. 1605

(3 James I.) *Bellingham's Case* (cited in *Oldfield's Case*, 12 Reports, 71).

Indictment for jostling a man and overthrowing him in Westminster Hall, the Courts sitting, but not smiting him with the hand or any weapon.

(75) A. D. 1607

(5 James I.) *Fuller's Case*, 12 Reports, 41.

Resolved by all the Judges that if a Counsellor at law in his argument shall scandal the King or his government, this is a misdemeanour and contempt to the Court; for this he is to be indicted, fined, and imprisoned.

(76) A. D 1629

(5 Charles I.) *Jeffe's Case*, Cro. Car., 175.

Indictment for a libel upon Sir Edward Coke and upon the King's Bench.

(77) A. D. 1631

(7 Charles I.) *Anon.* (cited in a note to Dyer, fo. 188 b).

Indictment of a prisoner for throwing a brick-bat at the presiding Judge 'que narrowly mist' (see note to *Harrison's Case*, *infra*).

(78) A. D. 1632

(8 Charles I.) *Rex* v. *Wingfield*, Cro. Car., 251.

Information in the King's Bench for assault upon the Sheriff of Middlesex while levying execution—one defendant acquitted by the jury. The rest convicted and fined.

(79) A. D. 1633

(9 Charles I.) *Sir William Waller's Case*, Cro. Car., 373.

Indictment for assault in the Palace of Westminster near the great hall, the Courts sitting. The sentence was imprisonment during the King's pleasure, fine of £1,000 and binding to good behaviour.

(80) A. D. 1638

(14 Charles I.) *Harrison's Case*, Cro. Car., 503.

Indictment in the King's Bench of a clergyman for rushing to the bar of the Common Bench when the Courts were sitting and openly accusing one of the presiding Judges of high treason.

Note. In this case the contempt was obviously committed in the actual view of the Court. The procedure by indictment seems to have been chosen because of the serious nature of the offence (see p. 75, *supra*).

(81) A. D. 1664

(16 Charles II.) *The King* v. *Buckenham*, 1 Keble, 751.

Information for striking in Westminster Hall.

(82) A. D. 1680

(32 Charles II.) *Radley's Case*, in *How. St. Tr.*, vii, 701.

Information for speaking scandalous words of the Chief Justice (see p. 85, *supra*).

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